No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

ATLANTIC PURCHASERS, INC.,
STELLA MARIS INN, LTD.,
Petitioners,

v.

AIRCRAFT SALES, INC.,
DONALD J. ANKLIN,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Petition for Certiorari - Procedure

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QUESTIONS PRESENTED

In an action commenced by a complaint alleging a common law intentional tort, which lead to a trial at which evidence on all issues relevant to the tort was introduced without objection, and which culminated in a jury verdict awarding actual and punitive damages based on a detailed finding of intentional wrongdoing by the defendants, and where the tort alleged and proved also constituted a statutory violation:

1. Whether under the notice pleading scheme of the Federal Rules of Civil Procedure, and particularly under Rules 8(a), 15(b) and 54(c), relief specifically required by the statute to be awarded by the court is to be denied solely because the statute was not expressly referred to in the complaint.

2. Whether a plaintiff is to be denied the relief specifically required by the statute solely because the statute was not expressly referred to in the complaint, despite the provision of Rule 54(c) that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

3. Whether a defendant is "prejudiced" so as to make the provisions of Rules 15(b) and 54(c) inapplicable where the plaintiff's complaint does not explicitly inform defendant of all possible legal theories and statutes affecting the amount of the damages recoverable under the allegations of the complaint.

4. Whether a prayer for punitive damages and "for such further relief as may be just and proper" constitutes an

"election of remedies" which precludes the recovery of damages specifically required by statute to be awarded.

DESIGNATION OF CORPORATE RELATIONSHIPS

Atlantic Purchasers, Inc., one of the parties filing this Petition for Certiorari, states that:

This is its original Designation of Corporate Relationships.

Stella Maris Inn, Ltd. is the parent of Atlantic Purchasers, Inc.

Atlantic Purchasers, Inc. does not have an ownership interest in any subsidiaries.

Atlantic Purchasers, Inc. does not have any affiliates.

Stella Maris Inn, Ltd., one of the parties filing this Petition for Certiorari, states that:

This is its original Designation of Corporate Relationships.

Stella Maris Inn, Ltd. is not owned by any parent corporation.

Stella Maris Inn, Ltd. does not have an ownership interest in any subsidiaries excepting only its wholly owned subsidiary, Atlantic Purchasers, Inc.

Stella Maris Inn, Ltd. does not have any affiliates.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 705 F.2d 712 (1983).

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 14, 1983. A suggestion for rehearing en banc was made by Judge Bryan. The suggestion failed as noted by Orders entered May 18 and May 27, 1983. Copies of the judgment of the court of appeals and the orders entered by Judge Bryan are appended to this petition in the Appendix. This petition for certiorari was filed within 90 days after the entry of judgment. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

RULES AND STATUES INVOLVED

Federal Rules of Civil Procedure:

> "**Rule 8. General Rules of Pleading.**
>
> (a) CLAIMS FOR RELIEF. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-

party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already had jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

"Rule 15. Amended and Supplemental Pleadings.

(b) AMENDMENTS TO CONFORM TO THE EVIDENCE. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the

objecting party to meet such evidence.

"Rule 54. Judgments,; Costs

(c) DEMAND FOR JUDGMENT. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

North Carolina General Statutes:

N.C. Gen. Stat. 75-1.1(a)(1969):

Methods of competition, acts and practices regulated; legislative policy. (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

N.C. Gen. Stat. 75-16 (1969):

If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and

against the defendant for treble the amount fixed by the verdict.

STATEMENT

a. Jurisdiction of District Court

This case was commenced in United States District Court for the Western District of North Carolina under the provisions of 28 U.S.C. 1332(a)(3).

b. Statement of the Case

The petitioners, Atlantic Purchasers, Inc. and Stella Maris Inn, Ltd. (plaintiffs at trial and appellants on appeal to the Fourth Circuit and herein referred to as "Petitioners") brought an action against Aircraft Sales, Inc. and Donald J. Anklin (defendants at trial and appellees on appeal to the Fourth Circuit and herein referred to as "Respondents") in the United States District Court for the Western District of North Carolina. The complaint alleged, inter alia, facts sufficient to

constitute the common law intentional tort of fraud. Petitioners, in their prayer for relief, requested actual damages, both direct and consequential, punitive damages, and "such other and further releif as may be just and proper."

At trial, Petitioners introduced, without objection, evidence sufficient to prove the common law intentional tort of fraud. Upon conclusion of Petitioners' case in chief, Respondents moved for a directed verdict under Fed. R. Civ. P. 50. (App. DE). Respondents' motion for a directed verdict was denied. Respondents, however, presented no evidence at trial and the case was submitted to the jury for their decision.

The jury, in their verdict, found every element necessary to constitute the intentional tort of fraud (App. F) and awarded to Petitioners both actual damages and punitive damages (App. F). The trial

court, McMillan, J., presiding, directed Petitioners to tender a judgment on the verdict. Petitioners tendered a judgment on the verdict providing, however, for a trebling of the actual damages as provided by N.C. Gen. Stat. §§ 75-1.1 and 75-16 (App. H). The court deemed the judgment as tendered by Petitioners not to be in compliance with its direction and filed a Memorandum to that effect stating that the court would "await the presentation of the post-verdict issues in some form contemplated by the Rules." (App. I)

In response, Petitioners filed a Motion under Rule 15 seeking to amend their complaint (App .J) to specifically allege a violation of N.C. Gen. Stat. §75-1.1, and to specifically request treble damages and attorney's fees under N.C. Gen. Stat. §§75-16 and 75-16.1, by way of relief for such violation.

The court, by its Order of January 26,

1982 (App. K), and Judgment (App. L) of the same date, refused to allow treble damages or attorney's fees, and at the same time denied Respondents' revived motions for judgment not withstanding the verdict and for a new trial.

Petitioners appealed from those portions of the Order and Judgment denying treble damages and attorney's fees. As a basis for reversal of the district court's decision Petitioners contended: (1) That having proved the common law intentional tort of fraud, as evidenced by the jury verdict, they had shown a violation of N.C. Gen. Stat. §75-1.1. Having shown a violation, they were entitled to the treble damages remedy provided by statute and in accordance with Fed. R. Civ. P. 54(c), even though request for such relief was not specifically made in the complaint; (2) That the district court erred in denying Petitioners post-verdict motion to

amend the complaint pursuant to Fed. R. Civ. P. 15(b); (3) That an award of treble damages would not be inconsistent with an award of punitive damages.

Respondents contended that they were not put on notice by the complaint of the possibility of treble damages prior to Petitioners' post-verdict requests, and therefore, such damages should not be awarded, and that Petitioners having elected to pursue a punitive damages remedy were precluded from recovering treble damages.

The court of appeals, in a 2-1 decision, found that the jury verdict would support a finding of Respondents' liability under N.C. Gen. Stat. §75-1.1, and, thus establish Petitioners' entitlement to treble damages. However, the majority held that to grant such relief would be unjust, because Petitioners' complaint gave no warning to Respondents that prosecution of

the case could result in treble damages. (App. M-16). The court further held that having sought punitive damages in their pleadings and throughout the trial, that is, having elected a punitive damages theory, Petitioners were precluded from a recovery of treble damages. (App. M-18).

A suggestion for rehearing en banc was made by Judge Bryan, who dissented from the opinion. The suggestion, however, failed as evidenced by the court's order dated May 18, 1983 (App. N) and amended order dated, May 27, 1983 (App. O).

c. Background Facts

Petitioners purchased a Beechcraft airplane from Respondents in 1975. After purchasing the Beechcraft, Petitioners spent a considerable sum improving it and upgrading it. After these expenditures and in spite of the repeated reassurances of Respondents, Respondents finally acknowledged that they did not have and

could not obtain or convey title to the Beechcraft to the Petitioners.

In order to settle the problem, Respondents proposed to take the Beechcraft back from Petitioners and to give Petitioners a credit toward the purchase of the Cessna Model 411 aircraft, which was the subject of this suit. (Tr. 16-18). Petitioners had no real choice at that point short of suing Respondents.

During the course of the negotiations leading up to Petitioner's agreeing to the proposed transaction, Respondent Anklin travelled to Florida where he met with Joerg Friese, Petitioners' agent, and with Petitioners' attorney. (Tr. 25, 29). During that meeting Anklin made specific representations about the Cessna, including its worth, airworthiness, mechanical condition and the number of operating hours on the airframe and the engines of the Cessna. (Tr. 21, 31). Later, at the time

of and as a precondition to actual delivery of the Cessna, express representations were made in the form of the aircraft and engine log books, which are themselves legal documents (Tr. 138-141), regarding hours, maintenance, inspections and airworthiness. (Tr. 32-33). The information in the log books was false in at least the following particulars: 1. Aircraft engine operating hours were substantially understated (Tr. 24, 151); 2. Required airworthiness inspections were certified as performed by Respondents' employees which had not in fact been performed (Tr. 98 lines 12-20, 114, lines 14-15); and 3. Major maintenance items performed by Respondents' employees, which would have provided an indication that all was not mechanically sound, were not recorded in the engine log books even though they were required to be (Tr. 144-153). Further, Respondents specifically

and expressly represented in the log books, after the signing of the contract, that the 100 hour inspections had been done and that the airplane was airworthy (Tr. 173).

The Lease Purchase Agreement which Friese signed in North Carolina was not a faithful rendering of the draft agreement prepared in Florida (Tr. 27). Friese did not read it prior to signing it because he was assured that it was simply a smooth copy of the agreement reached in Florida (Tr. 26, 28, 51-52, 54) and because it was presented to him for his signature at the airport as he was leaving. Given the length of the document and Friese's limited command of the English language [Friese is a native and citizen of the Federal German Republic (Tr. 4, 7-8)] sufficient time was not available for him to read it thoroughly (Tr. 26).

After only three weeks, during which the aircraft was operated 65 hours (Tr.

26), the Cessna experienced catastrophic engine failure while on a passenger-carrying flight over water between Fort Lauderdale, Florida, and Nassau, Bahamas (Tr. 10). Two disinterested mechanics who examined the airplane concluded that the engines had been operated a great many more hours than were represented (Tr. 93 lines 12 and 13, 97 lines 18 and 19, 144-153) represented and that the required airworthiness inspections had not been performed three weeks earlier as (Tr. 98 lines 12-20, 114 lines 14-15). Respondents represented that there were only 590 hours on the left engine and 260 hours on the right engine (Tr. 24), when the engines actually had 736 hours on them. Subsequent close inspection of the engine log books revealed that they had been tampered with in such a way as to appear to substantiate Respondents' representations as to hours (Tr. 144-153).

Without authority from Petitioners, Respondents undertook very extensive repairs of the engines (Tr. 40-43). Several facts stand out about those repairs. First, based upon the condition of the engines, the partial overhaul performed by Respondents was not an acceptable repair procedure (Tr. 213-215). Second, Respondents grossly overcharged for the repair parts purportedly used (Tr. 223). For example, Respondents paid $425.75 per cylinder (Tr. 188) for the cylinders used, and charged Petitioner $1,215.00 per cylinder ($895.00 for each cylinder itself plus $320.00 core deposit for each cylinder). Parts were supposed to have been furnished at cost. Third, Respondents grossly overcharged for numbers of hours of labor for the repairs. Petitioners were charged for 213 hours (Tr. 193), however, a maximum of 100 hours is required to accomplish the

repairs (Tr. 198, 234-235). Fourth, the total charge for the partial overhaul of the engines as billed by the Respondents was more than the cost of complete replacement engines with their entire TBO ahead of them (Tr. 199). Petitioners were charged $15,532.39 for engine parts only (Tr. 180), when two replacement engines would have cost only $16,000.00 (Tr. 199).

The great significance of the difference between the work performed by Respondents and the replacement of the engines is this: The engines of aircraft used in commercial service, as the Cessna was, must by law be replaced or given a "major overhaul" after so many hours of operation. (Tr. 210). In the case of the Cessna's engines, this Time Between Overhaul ("TBO") is 1,200 hours. (Tr. 200). "Major Overhaul" is a legally defined term. (Tr. 136, 210). The engine which has been rebuilt or undergone a major

overhaul begins to accumulate operating hours toward TBO all over again (Tr. 135-137). In that sense it is the same as a new engine. The work performed by Respondents did not nearly even approximate a Major Overhaul, and thus, did not start the TBO clock running again (Tr. 210, 212-215).

Petitioners refused to pay this huge bill for repairs that added not one hour to the legal useful life of the engines. When Petitioners refused to pay, Respondents kept the Cessna, including all of Petitioners equity in it. (Tr. 243-244).

ARGUMENT

The decision below should be reviewed because it erroneously interprets and applies the Federal Rules of Civil Procedure ("FRCP") in a way which is at once fundamentally at odds with the basic concept of notice pleading which pervades the rules, with the express language of Rules 8(a), 15(b) and 54(c) and with the decisions of the other federal courts of appeal and this Court. On that ground alone this Court should grant review so as to exercise its power of supervision. In addition, the decision below decides important federal questions in conflict with applicable decisions of other federal courts of appeal and of this Court.

At the outset several facts regarding the complaint and the law of North Carolina must be pointed out. The complaint (App. A) alleged, inter alia, common law

fraud. The allegations of the complaint met the special pleading standards of Fed. R. Civ. P. 9(b) in pleading the fraud and its elements with particularity. Under the law of North Carolina fraud as a matter of law constitutes a violation of N.C. Gen. Stat. §75-1.1. Hardy v. Tolar, 288 N.C. 303, 218 S.E.2d 342 (1975). Where a violation §75-1.1 is shown by the actual findings of the jury, the plaintiff is entitled as a matter of right to have the actual damages trebled by the court. Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981). Trebling of damages is not a matter within the discretion of the trial court. Id. A complaint which adequately states a claim for fraud places in issue all the matters relevant to show a violation of the statute. All this was acknowledged by the court below. The majority opinion of the court of appeals concedes at the outset that "[h]ad Stella

Maris brought this case under the act [N.C. Gen. Stat. §§75-1.1 and 75-16], we may assume it would have been entitled to treble damages."(App. M-11) The majority then went on to hold that Stella Maris was not entitled to treble damages because the defendants (Respondents here) were not warned of the possibility of treble damages by the complaint. The majority held that absent such a warning in the complaint defendents would prejudiced by an award of treble damages.

I. THE DECISION OF THE COURT OF APPEALS IS DIRECTLY CONTRARY TO THE NOTICE PLEADING SCHEME OF THE FEDERAL RULES OF CIVIL PROCEDURE AND CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AND OF THIS COURT INTERPRETING AND IMPLEMENTING THAT SCHEME.

The majority opinion of the court below amounts to a wholesale revision of

the notice pleading scheme of the FRCP. What the court below would require is that the complaint inform defendants not only of the matters upon which proof will be required, but also of all of the legal theories of recovery possible, and the precise legal consequences of each of those theories of recovery. On the other hand, what is required by the FRCP and decisions of this Court is a "short and plain statement of the claim showing that the pleader is entitled to relief." Such a statement need not even contain a single legal theory of recovery. What is required is fair notice of the factual basis of plaintiff's complaint, not notice of the legal basis. Under the FRCP, pleading is not a game in which the skill of counsel should determine the outcome an action. Rather, the outcome should be determined by the merits of the case. Foman v. Davis, 371 U.S. 178 (1962)."[P]laintiffs need not

set forth any theory or demand for any particular relief for the Court will award appropriate relief if the plaintiff is entitled to it." New Amsterdam Casualty Company v. Waller, 323 F.2d. 20 (4th Civ. 1963) citing Conley v. Gibson, 355 U.S. 41, 47-48 (1957).

In particular, the pleading of statutes is not required for "fair notice". All that is required is that the facts which establish the statutory entitlement be adequately alleged. It is black letter law that public statutes need not be pleaded even under the most restrictive pleading schemes because they are the subject of judicial notice. 61A Am. Jur. 2d, Pleading §9 (1981). The Official Forms appended to the FRCP demonstrate conclusively that even statutes creating a cause of action need not be pleaded. Neither Form 14 nor Form 15 setting out approved complaints for actions

under the Federal Employer's Liability Act and under the Merchant Marine [Jones] Act refer in any way to the statutes which create the substantive right. Judged by the pleading standards of the majority below, neither form states a claim under the statutes. If the universal rule that public statutes need not be pleaded is to cease to apply in the federal courts and if the Official Forms may no longer need to be relied upon to state a claim, such changes ought to be reviewed, announced and elaborated by this Court.

The decision below reflects confusion over the differing roles played by the pleadings and the various discovery devices. The confusion is made manifest by that portion of the opinion which tests the sufficiency of the complaint against the policies of the discovery rules. (App. M-16. If the information which is subject to discovery must be set out in the

complaint, compliance with Fed. R. Civ. P. 8(a)'s requirement of a "short and plain statement" is impossible and the discovery rules are surplusage. The FRCP recognize that it is through discovery rather than through the pleadings that the real factual information about a claim is obtained.

Fed. R. Civ. P. 15(b) also shows that the function of the pleadings is to frame the issues upon which evidence is to be expected. That rule provides that where an issue is in fact litigated those issues are decided even if not raised by the pleadings. The rule requires this in two ways. First, it requires that an amendment to the pleadings to raise the issues is proper even after judgment and, further, that even if no amendment is made the issues are nonetheless determined. It is true that the district court has discretion in the matter of amendments, but refusal to allow an amendment must be based upon an

articulated, legally justified factual basis. Foman v. Davis, 371 U.S. 178, 182 (1962). Here no facts were found or articulated. The district court said only that it would be "indecent". This is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the FRCP. While an implied amendment is not permitted where to do so would deny a party fair opportunity to present evidence regarding issues which would be added by the amendment, otherwise such amendent is permitted. Mineral Industries & Heavy Construction Group v. Occupational Safety & Health Review Comm., 639 F.2d 1289, 1292 (5th Cir. 1981). In the present case, the implied amendment should have been permitted since no new issues were raised by it. No issues not encompassed within fraud are involved in the determination of a statutory violation.

Fed. R. Civ. P. 54(c) provides the capstone to the argument regarding the meaning and effect of the notice pleading scheme. That rule provides that where no issues are in fact litigated because of a default, plaintiffs are to receive judgment exactly as requested, both as to kind and as to amount. But the rule goes on to provide that where issues are litigated exactly the reverse is true. Where there is no default the judgment is to award the kind and amount of relief justified by the trial outcome without regard to what was requested in the pleadings. Steinmetz v. Bradbury Co., 618 F.2d 21 (8th Cir. 1980). (Award of $150,000 where prayer asked for $21,000.).

If the notice pleading scheme of the FRCP is to be changed so as to require the pleading of theories and public statutes that change should not occur without either a formal revision of the rules or at least

this Court's careful consideration and articulation of the nature and extent of the change.

II. THE DECISION OF THE COURT OF APPEALS DECIDES IMPORTANT FEDERAL QUESTIONS IN CONFLICT WITH THE APPLICABLE DECISIONS OF OTHER FEDERAL COURTS OF APPEAL AND OF THIS COURT.

The majority opinion of the court below decided several specific important federal questions in a manner which conflicts with the decisions of the other courts of appeal and of this Court on the same questions.

The court below acknowledged the general rule that under Fed. R. Civ. P. 54(c) and its own decision in Robinson v. Lorillard Corporation, 444 F.2d 791, 803 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971) "it is the court's duty to grant

whatever relief is appropriate in the case on the facts proved." (App. M-14). The majority went on to observe, quite correctly, that this rule is not without limit. Specifically, the court stated that there is an exception to the rule where the grant of relief not requested would so prejudice the opposing party that injustice would result. Having stated accepted law to this point the court then departed from all precedent and made the exception swallow the rule by finding prejudice where none has previously been held to exist.

First, the court held that "a substantial increase in the defendant's potential ultimate liability can constitute specific prejudice barring additional relief under Rule 54(c)." (App. M-15). No precedent for such a holding can be found. The court cited Goodman v. Poland, 395 F. Supp. 660, 685 (D. Md. 1975) as support for that proposition. In fact that

case, like all the others which have been found, is strongly contrary to the position of the court below. That case involved an amendment under Fed. R. Civ. P. 15(c) to add a claim for punitive damages for common law fraud. The District Court allowed the amendment, held that no prejudice would result and noted that in light of Fed. R. Civ. P. 54(c) "[a]n amendment changing the amount, or nature, of the relief prayed for is, therefore, actually unnecessary." Id. at 685 n. 16 (emphasis added). Accord, e.g., Garland v. Garland, 165 F.2d 131 (10th Cir. 1947). An increase from none to a definite amount is unlikely to be insubstantial, unless only nominal damages are involved. If the decision of the court below is correct in holding that an increase in damages over those prayed for is prejudicial, then more than merely nominal damages could never be awarded where only equitable relief was

requested. In fact, damages have repeatedly been awarded to plaintiffs whose complaint sought only equitable relief. It has long been held that under Fed. R. Civ. P. 54(c) even a plaintiff who has demanded only equitable relief must nevertheless be awarded damages where entitlement is shown by the evidence. Where damages are requested, the prayer does not limit the amount of the damages to be allowed. E.g., Neff v. western Coop Hatcheries, 241 F.2d 357 (10th Cir. 1957). If the majority opinion of the court below stands as a valid precedent, the plain and long accepted meaning of Fed. R. Civ. P. 54(c) will be upset. The distinction between default cases and contested cases will have disappeared and the relief granted in both types of cases will be limited by the prayer in the complaint. So fundamental a change in the rules governing procedure in

the federal courts ought not to occur without the consideration and direction of this Court.

Next the majority in the court below found a lack of "fundamental fairness" because the defendants were not notified of the existence of the possibility of the "unusual" statutory relief. Aro Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476, 491 n.9 (1964) is cited in support of this proposition. That footnote merely says that the antitrust counterclaim was not adequately pleaded. Presumably this was because sufficient allegations to sustain an antitrust violation were not made. Nowhere is there any hint that the pleadings were inadequate because the statute was not cited or because no notice of a claim for treble damages was made. But, as Judge Bryan pointed out in dissent below, the Respondants were given repeated notice of their treble damage liability.

They were notified by the statute itself and by the decisions of the courts of North Carolina.[1] No case has been found where relief required by statute was denied because the defendants were unaware of the statute. It is black letter law that statutory provisions of the forum need not be pleaded or proven. 61A Am. Jur. 2d, Pleading §9 (1981) . Fed. R. Civ. P. 44.1 does require notice in the pleadings regarding any issue of the law of a foreign country. The negative implication is that issues relating to the laws of the forum need not be raised in the pleadings. If ignorance of the law is to become a new defense in the federal courts it should not occur without the careful consideration of this Court.

[1]Respondents' attorney was actually, as opposed to constructively, aware of Hardy v. Tolar, 288 N.C. 303, 218 S.E.2d 342 (1975) and of its similarity to and implications for this case. (Tr. 267).

Finally, the majority below held that because Petitioners had sought punitive damages in their pleadings and at trial they should not now be allowed to abandon that "theory"[2] and change their "strategy". The relief of punitive damages is not a theory. Petitioners "theory" was, remained, and is fraud. All the evidence presented was to show fraud. If Petitioners had pursued a "theory" of statutory violation it would not have changed the issues at trial in the slightest except, ironically, to make the burden of proof lighter. While fraud is a violation of the statute, conduct not amounting to fraud also violates the

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[2]"The 'theory of the pleadings' doctrine under which a plaintiff must succeed on those theories that are pleaded or not at all, has been effectively abolished under the federal rules. Ogalala Sioux Tribe of Indians v. Andrus, 603 F.2d 707, 714 (8th Cir. 1979).

statute[3]. Likewise the defenses available to the Respondents would have been exactly the same. If Petitioners had pursued a "strategy" of treble damages instead of actual and punitive damages the proof at trial would have been exactly the same. Under the bifurcated North Carolina procedure the jury has no reason to know that treble damages will be awarded - that is done by the court after the jury determines the actual damages. If the elements of Petitioners' case were the same and if the defenses available to Respondents were the same regardless of which "theory" or "strategy" was involved, where is the prejudice to Respondents? One of the ironies of the position of the trial court and of the majority of the court

[3]While fraud is as a matter of law a violation of the statute, the statute is also violated by less culpable conduct. Even innocent, unintentional, technical violations of the statute subject a defendant to the treble damaages remed. Marshall v. Miller, 302 N.C. 539, 276 S.E. 397 (1981).

and proven actual, active fraud on the part of the Respondents are to recover substantially less than if they had only shown an unintentional, entirely technical and harmless violation of the statute. Indeed Petitioners' request for the statutory remedy has been termed "indecent". As Judge Bryan said in dissent "by whom and by what was the indecency caused." (App. M-22,23)

The majority opinion in the court below summarized its finding of prejudice as arising from the absence of "'illumination ... as to the substantive theory under which [Stella Maris was] proceeding,' Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 66 (1978), which is the function of the pleadings under the Federal Rules." (App. M-19) This portion of the majority opinion misconstrues both Holt and the purpose of the pleadings. The entire quote from Holt is as follows:

> We agree with appellants that a federal court should not dismiss a meritorious constitutional claim because the complaint seeks one remedy rather than another plainly appropriate one. Under the Federal Rules of Civil Procedure 'every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." Thus, although the prayer for relief may be looked to for illumination when there is doubt as to the substantive theory under which a plaintiff is proceeding, its omissions are not in and of themselves a barrier to redress a meritorious claim. [Cite omitted.] But while a meritorious claim will not be rejected for want of a prayer for appropriate relief, a claim lacking substantive merit obviously should be rejected. We think it is clear from the pleadings in this case that appellants have alleged no claim congnizable under the U.S. Constitution. (emphasis added)

In Holt this Court reaffirmed, contrary to the majority below, the accepted proposition that the prayer for relief is not normally a part of the statement of the claim, though in some cases it might save an otherwise inadequate pleading. The purpose of the pleadings is to give notice

of the facts, circumstances and transactions which give rise to a right to relief. Where the allegations show the existence of a right to relief the pleading is sufficient even where the theory is wrong. Until the majority decision below, the authorities were in unanimous agreement that a complaint need not set out any theory in order to be sufficient. Such a misinterpretation of this Court's opinion in Holt and such an expansion of the function of the pleadings should not go unreviewed by this Court.

If prejudice results from a grant of damages in excess of those in the prayer and if prejudice results where all legal theories are not set out in detail and if prejudice results from an award of relief on any legal theory not elaborated in the complaint, then what is left of Rule 54(c)? If Rule 54(c) is to be eliminated it should be done by this Court

in an explicit fashion rather than by allowing it to be swallowed by its own exceptions. If Rule 54(c) is eliminated the inevitable result must be a return to the lengthy, detailed, technical pleadings which it was the purpose of the FRCP to eliminate.

III. A GENERAL PRAYER FOR PUNITIVE DAMAGES AND "FOR SUCH FURTHER RELIEF AS MAY BE JUST AND PROPER" IS NOT AN ELECTION OF REMEDIES BUT IS RATHER AN INVOCATION OF RULE 54(C).

The majority opinion in the court below entirely ignored the fact that the complaint contained a general prayer for relief. As already discussed the prayer does not affect a plaintiff's right to recovery; however, in any event this prayer was a direct invocation of the provisions of Rule 54(c) and was more than sufficient to warn Respondents that the relief sought by Petitioners was not necessarily limited

to the specific items enumerated in the prayer. The doctrine of election of remedies ceased to apply in federal cases after the adoption of the FRCP. E.g., Bernstein v. U.S., 256 F.2d 697 (10th Cir. 1958). Even prior to the adoption of the FRCP the doctrine only applied to prevent recoveries upon inconsistent factual allegations. There is no factual inconsistency between allegations of fraud and allegations of a violation of the statute. On the contrary allegations of fraud are by definition allegations of a statutory violation.

The cases have held that while a general prayer is almost always unnecessary, it nonetheless provides a more than ample basis for awarding appropriate

relief not specifically prayed. Francois v. Francois, 599 F. 2d 1286 (3rd Cir. 1979). See, U.S. v. Marin, 651 F.2d 24, 30, 31 (1st Cir. 1981); Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir. 1971); Rental Development Corporation of America v. Lavery, 304 F.2d 839, 841, 842 (9th Cir. 1962). In the presence of such a prayer even relief which has been previously disclaimed may be awarded where no prejudice will result. Robinson v. Lorillard Corp., 444 F.2d 791 (1971).

If the majority opinion below is allowed to become precedent it will inevitably force counsel to engage in long detailed enumerations of even the most far fetched remedies in reciting a prayer for relief. Such a retreat from the reforms effected by the FRCP should not escape this Court's review.

CONCLUSION

For the reasons discussed above, it is respectively submitted that this petition for a writ of certiorari should be granted.

Paul D. Copenbarger
Attorney for Petitioners
COPENBARGER & COPENBARGER
2171 Campus Drive
Suite 200
Irvine, CA 92715
(714) 476-2002

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 1983, three copies of this Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit were mailed, first class, postage prepaid, to counsel for the Respondents, David R. Badger, Esq., Suite 7, Equity Building, 701 East Trade Street, Charlotte, North Carolina 28202. I further certify that all parties required to be served have been served.

Paul D. Copenbarger
Counsel for Petitioners

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NORTH CAROLINA

CHARLOTTE DIVISION

CC 79-204

ATLANTIC PURCHASERS, INC.	:
and	:
STELLA MARIS INN, LTD.,	:
Plaintiff,	:
v.	:
AIRCRAFT SALES, INC.	:
and	:
DONALD J. ANKLIN,	:
Defendant.	

C O M P L A I N T

Now comes ATLANTIC PURCHASERS, INC. (hereinafter "ATLANTIC PURCHASERS") and STELLA MARIS INN, LTD. (hereinafter "STELLA MARIS") and state their Complaint as follows:

1.

ATLANTIC PURCHASERS is a Florida corporation and has its principal place of business at 1177 Southeast Third Avenue, Fort Lauderdale, Florida.

2.

STELLA MARIS is a corporation formed and existing under the laws of the Bahamas and has its principal place of business on Long Island, Bahamas. STELLA MARIS is the sole shareholder of ATLANTIC PURCHASERS.

3.

AIRCRAFT SALES, INC. (hereinafter "AIRCRAFT SALES") is a North Carolina corporation and has its principal place of business at Douglas Airport, Charlotte, North Carolina.

4.

DONALD J. ANKLIN (hereinafter "ANKLIN") is a resident of North Carolina and resides at Rt. 1, Box 581, Island Forest Drive, Davidson, North Carolina.

ANKLIN is the president and sole shareholder of AIRCRAFT SALES.

5.

This Court has subject matter jurisdiction under the provisions of 28 U.S.C. 1332 (a) (3) since the matter in controversy exceeds the sum of $10,000.00 exclusive of interest and costs and is between citizens of different states and citizens of foreign states.

6.

This Court has personal jurisdiction over and venue is proper as to both defendants who are residents of the Western District of North Carolina.

7.

On or about July 25, 1975, ATLANTIC PURCHASERS purchased an aircraft identified as a 1955 Beechcraft Model BE18S bearing registration number N426SF (hereinafter the "Beechcraft") from AIRCRAFT SALES and ANKLIN. The cash

purchase price of the Beechcraft was $25,000.00 of which $19,000.00 was paid by the trade-in of a 1962 Piper Aztec Model PA-24-250 (hereinafter the "Piper") and the balance in cash. The cash for the purchase of the Beechcraft was supplied by STELLA MARIS who also beneficially owned the Piper. STELLA MARIS subsequently spent $24,750.00 in repairs, modifications and improvements on the Beechcraft.

8.

AIRCRAFT SALES and ANKLIN warranted title to the Beechcraft but in April of 1976 ATLANTIC PURCHASERS and STELLA MARIS learned that good title to the Beechcraft had not been passed. AIRCRAFT SALES and ANKLIN continued to promise the delivery of good title to the Beechcraft until August of 1976. Because of the lack of good title to the Beechcraft, STELLA MARIS and ATLANTIC PURCHASERS lost the use of the Beechcraft

in April of 1976.

9.

At all times pertinent hereto AIRCRAFT SALES and ANKLIN knew that good title had not been and could not be delivered by them.

10.

In August of 1976, AIRCRAFT SALES and ANKLIN acknowledged their inability to convey good title to the Beechcraft and proposed to accept the Beechcraft in trade on a lease-purchase of a 1965 Cessna Model SN411 bearing registration number N190X (hereinafter the "Cessna").

11.

On August 25, 1976, STELLA MARIS and ATLANTIC PURCHASERS agreed to the proposal of AIRCRAFT SALES and ANKLIN. STELLA MARIS and ATLANTIC PURCHASERS re-delivered the Beechcraft to AIRCRAFT SALES and ANKLIN and received

credit in the amount of $54,750.00 for it toward the lease-purchase of the Cessna.

12.

At the time of the delivery of the Cessna by AIRCRAFT SALES and ANKLIN to STELLA MARIS and ATLANTIC PURCHASERS it was represented by AIRCRAFT SALES and ANKLIN to be worth $84,750.00 and to be in accordance with the operating and maintenance history delivered with the Cessna as a part of its legal documentation.

13.

At all times pertinent hereto AIRCRAFT SALES and ANKLIN knew that the Cessna was worth substantially less than the represented value and that the Cessna was not in accordance with its documentation.

14.

In October 1976, after approximately 70 hours of operation, the

Cessna experienced engine failure on one of its two engines. An inspection of both engines revealed them to be badly worn and to have had many more hours of operation than was represented by AIRCRAFT SALES and ANKLIN in the documentation delivered with the Cessna. After temporary repairs, the Cessna was delivered to AIRCRAFT SALES and ANKLIN for repair.

15.

AIRCRAFT SALES and ANKLIN purported to complete the repairs on or about January 1, 1977, and billed STELLA MARIS and ATLANTIC PURCHASERS a total of $27,476.05 for the purported repairs.

16.

STELLA MARIS and ATLANTIC PURCHASERS paid $1,349.88 toward the lease-purrchase of the Cessna in addition to the trade-in of the Beechcraft and also paid $5,150.00 as an advance toward the cost of repairs on the Cessna.

17.

Examination of the billing for the purported repairs to the Cessna revealed that the "repairs" were in direct violation of federal airworthiness directives applicable to the engines involved, all of which was known to AIRCRAFT SALES and ANKLIN.

18.

AIRCRAFT SALES and ANKLIN refused to correctly repair the Cessna or to release it until they received the entire $27,465.05 claimed by them to be due.

19.

AIRCRAFT SALES and ANKLIN have disposed of the Cessna in an unreasonable manner and in violation of the rights and interests of STELLA MARIS and ATLANTIC PURCHASERS and have made no accounting for any proceeds of such disposition.

20.

All transactions described hereinabove were conducted by AIRCRAFT SALES and ANKLIN as a part and in furtherance of a continuing conspiracy to defraud ATLANTIC PURCHASERS and STELLA MARIS.

21.

AIRCRAFT SALES is the alter ego of ANKLIN and ANKLIN is personally responsible and liable for all acts and omissions of AIRCRAFT SALES.

22.

As a result of the fraud and misrepresentations of AIRCRAFT SALES and ANKLIN, ATLANTIC PURCHASERS and STELLA MARIS have been defrauded of money and property in a sum exceeding $61,000.00.

23.

As a result of the loss of the use of the Beechcraft and the Cessna, which loss of use was the direct result of

the fraud and misrepresentation of AIRCRAFT SALES and ANKLIN, and which loss continues to the present time, ATLANTIC PURCHASERS and STELLA MARIS have suffered losses exceeding $120,000.00 at the present time.

WHEREFORE, ATLANTIC PURCHASERS and STELLA MARIS pray for judgment against AIRCRAFT SALES and ANKLIN, jointly and severally as follows:

(a) in the sum of $61,000.00 plus interest until paid for losses of money and property taken by AIRCRAFT SALES and ANKLIN through their fraud;

(b) in the sum of $120,000.00 plus losses from the date hereof to the date of judgment, plus interest until paid for losses resulting from the non-availability of the Beechcraft and the Cessna;

(c) in the sum of $300,000.00 as punitive damages;

(d) for the costs of this action; and

(e) for such further relief as may be just and proper.

HICKS, MALOOF & CAMPBELL

By: /S/
Paul Copenbarger

Suite 3401
101 Marietta Tower
Atlanta, Georgia 30303
(404) 588-1100

CASEY & DALEY, P.A.

By: /S/
Hugh G. Casey, Jr.

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NORTH CAROLINA

CHARLOTTE DIVISION

CC 79-204

ATLANTIC PURCHASERS, INC.

and

STELLA MARIS INN, LTD.,

Plaintiff,

v. ANSWER

AIRCRAFT SALES, INC. (JURY TRIAL DEMAND)

and

DONALD J. ANKLIN,:

Defendant.

NOW COMES DONALD J. ANKLIN, answering the Complaint of the plaintiffs, and alleges and says:

FIRST DEFENSE

That the Complaint fails to state a claim for relief against Donald J. Anklin upon which relief can be granted.

SECOND DEFENSE

1. That upon information and belief, the allegations contained in Paragraph 1 of the plaintiffs' Complaint are admitted.

2. That upon information and belief, the allegations contained in Paragraph 2 of the plaintiffs' Complaint are admitted.

3. That the allegations as to Aircraft Sales, Inc., being a North Carolina corporation are admitted. The defendant denies that its principal place of business is located at Douglas Airport, Charlotte, North Carolina.

4. That the allegations contained in Paragraph 4 of the plaintiffs' Complaint are admitted.

5. That the allegations contained in Paragraph 5 of the plaintiff's Complaint are admitted.

6. That the allegations contained in Paragraph 6 of the plaintiffs' Complaint are admitted.

7. That upon lack of information and belief, the allegations contained in Paragraph 7 of the plaintiffs' Complaint as to plaintiff Stella Maris supplying the cash necessary for the purchase of the Beechcraft as well as their beneficial ownership of the Piper are denied. That upon lack of information and belief as to the amount of money which Stella Maris expended in repairing, modifying, and improving the Beechcraft aircraft, said allegations are denied. The defendant specifically denies that the Beechcraft airplane was purchased from the defendant Anklin. All other allegations contained in Paragraph 7 of the plaintiffs' complaint are admitted.

8. That the allegations contained in Paragraph 8 of the plaintiffs' Complaint are denied.

9. That the allegations contained in Paragraph 9 of the plaintiffs' Complaint are denied.

10. That is is admitted that sometime during August of 1976, the defendant Anklin communicated Aircraft Sales, Inc.'s inability to convey good title to the Beechcraft and made a subsequent proposal to the plaintiffs as set forth in Paragraph 10 of the plaintiffs' Complaint. It is denied that the defendant Anklin made this communication or any other communication in an individual capacity; any and all conversations which the defendant Anklin had with the plaintiff during the entire course of their relationship was in a corporate capacity as President of Aircraft Sales, Inc., and not as an individual. Except as to those matters denied above, all other allegations contained in Paragraph 10 of the plaintiffs' Complaint are admitted.

11. That the allegations contained in Paragraph 11 as to any agreement between

the plaintiffs and the defendant Anklin in an individual capacity are denied. That the defendant denies the date upon which the plaintiffs claim an agreement was entered into by the plaintiffs and defendant. All other allegations contained in Paragraph 11 of the plaintiffs' Complaint are admitted.

12. That the defendant admits that at the time of the delivery of the Cessna by the defendant Aircraft Sales, Inc. to the plaintiffs, the defendant was informed and believed that the Cessna was in accordance with the operating and maintenance history contained in its legal documentation. All other allegations contained in Paragraph 12 of the plaintiffs' Complaint are denied.

13. That the allegations contained in Paragraph 13 of the plaintiffs' Complaint are denied.

14. That it is admitted that following temporary repairs by the defendant as agent for the defendant Aircraft Sales, Inc., and upon request by the plaintiffs, the Cessna was delivered to Aircraft Sales, Inc. for repairs with the authorization and approval of the plaintiffs. All other allegations contained in Paragraph 14 of the plaintiffs' Complaint are denied.

15. That is is admitted that Aircraft Sales, Inc., billed the plaintiffs a total of $27,476.05 for the actual repairs made upon the Cessna leased by the plaintiffs Atlantic Purchasers, Inc.; all other allegations contained in Paragraph 15 of the plaintiffs' Complaint are denied.

16. That the allegations contained in Paragraph 16 of the plaintiffs' Complaint are admitted.

17. That the allegations contained in Paragraph 17 of the plaintiff's Complaint

as to this defendant are denied. That upon lack of information and belief the allegations contained in Paragraph 17 as to any repairs made by defendant Aircraft Sales are also denied.

18. That the allegations contained in Paragraph 18 as to either defendant's refusal to correctly repair the Cessna are denied. That the defendant, as agent for Aircraft Sales, admits that he refused to release the Cessna until the entire amount of $27,465.05 claimed by the defendant Aircraft Sales to be due was paid.

19. That the defendant, as agent for the defendant Aircraft Sales, denies disposing of the Cessna in an unreasonable manner in the violation of the rights and interest of the plaintiffs. The defendant, as agent for the defendant Aircraft Sales, admits that no accounting for any proceeds from the Cessna have been made to the plaintiffs.

20. That the allegations contained in Paragraph 20 of the plaintiffs' Complaint are denied.

21. That the allegations contained in Paragraph 21 of the plaintiffs' Complaint are denied.

22. That the allegations contained in Paragraph 22 of the plaintiffs' Complaint are denied.

23. That the allegations contained in Paragraph 23 of the plaintiffs' Complaint are denied.

THIRD DEFENSE

As a further defense and answer to the plaintiff's Complaint, the defendant, Donald J. Anklin, alleges and says:

1.. That the allegations contained in Paragrahs 1 and 2 of the plaintiffs' Complaint are herein incorporated by reference.

2. That the defendant, Aircraft Sales, Inc., (hereinafter "Aircraft

Sales") is a North Carolina corporation with its principal place of business in Iredell County, North Carolina.

3. That the allegations contained in Paragraph 4 of the plaintiffs' Complaint are herein incorporated by reference.

4. That at the time the plaintiff Atlantic Purchasers purchased a 1955 Beechcraft Model BE18S bearing registration number N426SF (hereinafter referred to as "Beechcraft"), the plaintiffs were aware of a possible defect in the title to the Beechcraft. That despite said notice, the plaintiffs entered into the purchase of the Beechcraft from the defendant in the hope that good title could be delivered from the party from whom the defendant had purchased said airplane; that the plaintiffs' agent, Jorge Friese, and the defendant exerted all efforts to procure good title from a Tennessee bank, which

had prior ownership of the Beechcraft; that despite all efforts, good title could not be obtained for the Beechcraft.

5. That upon plaintiff's own admission in their Complaint, the plaintiffs and the defendant Aircraft Sales agreed to a novation of the prior sale between the parties and the plaintiffs voluntarily agreed to defendant Aircraft Sales' proposal to accept the Beechcraft in trade on a lease purchase of a 1965 Cessna Model SN411 bearing registration number N190X (hereinafter referred to as the "Cessna"), in settlement over said title dispute to the Beechcraft.

6. That on August 23, 1979, plaintiff Atlantic Purchasers executed a bill of sale to the defendant Aircraft Sales conveying any and all right, title, and interest which the plaintiff may have had in the Beechcraft to the defendant Aircraft Sales, Inc.

7. That on August 21, 1976, plaintiff Atlantic Purchasers and the defendant Aircraft Sales entered into a lease-purchase agreement of the Cessna aircraft; said lease is attached to the defendant's Answer, marked as Exhibit A, and is herein incorporated by reference. That at the time the lease-purchase agreement was entered into between the plaintiffs and Aircraft Sales, Aircraft Sales in Paragraph 8 of the lease-purchase agreement, expressly disclaimed any warranties of merchantability or fitness for any particular purpose; the plaintiff Atlantic Purchasers, as lessee, further agreed in said lease-purchase agreement that the lessor shall not be responsible for any loss or consequential damages due to engine failure or mechanical or structural breakdown of any sort or from any cause. Furthermore, in Paragraph 9 of said lease-purchase agreement, Atlantic

Purchasers, as lessee, agreed that "such maintenance and repairs as are performed by lessors, shall be billed to the lessee, who agrees to pay such bills in addition to and as part the next rental payment due."

8. That in November of 1976, defendant, as agent for Aircraft Sales, was contacted by plaintiff Atlantic Purchasers, and was informed that the Cessna had experienced engine failure i one of its two engines; that plaintiff Atlantic Purchasers requested the defendant to come to Nassau, where the aircraft was located, to inspect the Cessna; that on or about December 2, 1976, the defendant, as officer and agent of Aircraft Sales, traveled to Nassau and inspected the Cessna; that upon inspection, defendant determined that extensive damage had been done to the aircraft's engine due to the over-boosting

of one engine; that an extended flight following the over-boosting of one engine resulted in excessive cylinder head pressure in the second engine causing partial failure of that engine; that these damages were not the result of any pre-existing condition of the engine but rather were caused by misuse of the aircraft and pilot error.

9. That the plaintiff, Atlantic Purchasers, authorized the defendant Aircraft Sales through its agent, Donald J. Anklin, to return the Cessna to Aircraft Sales' place of business in North Carolina, and further requested that Aircraft Sales perform all work necessary to repair the damage and place the aircraft in flyable condition.

10. That in order to return the Cessna to Aircraft Sales' facilities in North Carolina, defendant installed two new cylinders and performed other work

necessary to fly the aircraft to Charlotte, North Carolina; that following defendant's inspection in Nassau, defendant informed the plaintiff Atlantic Purchasers, that extensive work would be necessary and assessed the damages to the aircraft at over $20,000.00.

11. That as evidenced by plaintiffs' Complaint, plaintiff Atlantic Purchasers paid the defendant Aircraft Sales $5,150.00 as a cash advance to cover the initial repair expenses on the part of Aircraft Sales.

12. That on or about January 7, 1977, Aircraft Sales, after completing substantial repairs to the Beechcraft in the amount of $27,476.05, mailed to the plaintiff Atlantic Purchasers an itemized bill for that amount less the $5,150.00 cash advance paid by the plaintiff to the defendant Aircraft Sales.

13. That under the terms of the lease-purchase agreement entered into between the plaintiff Atlantic Purchasers and Aircraft Sales, the plaintiff agreed to pay a monthly rental payment in the amount of $674.94 per month for sixty months at which time plaintiff would have the option to purchase the aircraft; that plaintiff made said rental payments for the months of September and October, 1976; that as of the time the repairs were completed by Aircraft Sales, plaintiff was two months in arrears on its monthly rental payments.

14. That by registered letter addressed to Mr. Richard Gray, President of plaintiff Atlantic Purchasers, Inc., said letter being attached to the Complaint, marked as Exhibit B, and is herein incorporated by reference, the defendant Aircraft Sales, through its President, Donald J. Anklin, have written

notice to the plaintiff that by virtue of its failure to perform Paragraphs 3,8,9 and 10 of the lease, said lease would be terminated unless cured forthwith by the Plaintiff.

15. That neither Atlantic Purchasers, Inc. nor Stella Maris Inn, Ltd. made any attempt to correct plaintiff Atlantic Purchasers' default under the above-named paragraphs of the lease agreement; as a result, said lease was terminated by the defendant.

16. That upon termination of the lease agreement, and in accordance with Paragraph 12 and 15 of the lease agreement, Aircraft Sales satisfied a prior existing loan secured by the Cessna, the plaintiffs having knowledge of said loan, and applied the balance of monies received on behalf of the Cessna toward the plaintiff Atlantic Purchasers' outstanding repair bill in the amount of $22,326.05.

FOURTH DEFENSE

1. That the defendant, Donald J. Anklin, herein incorporates Paragraphs 1 through 16 of the defenant's Third Defense by reference.

2. That any right of action which the plaintiffs have set forth in the Complaint as to any loss of use alleged to have been incurred by them as the result of their ownership of a 1955 Beechcraft Model BE18S bearing registration number N426SF accrued more than three years prior to the commencement of this action and is barred by the Statute of Limitations.

FIFTH DEFENSE

1. That the defendant, Donald J. Anklin, herein incorporates Paragraphs 1 through 16 of the defendant's Third Defense by reference.

2. That on July 25, 1975, plaintiff Atlantic Purchasers, Inc., through it President, Jorge Friese, signed a sales

contract with the defendant Aircraft Sales, Inc., for the purchase of a 1955 Beechcraft Model BE18S bearing registration number N426SF at the defendant Aircraft Sales' place of business in Charlotte, North Carolina; that as part of this sales contract, it was specifically set forth by Aircraft Sales that the airplane in question was sold without warranty of any kind; that the sales contract further stated that the airplane was to be sold "on ramp as is, where is."

SIXTH DEFENSE

1. That the defendant herein incorporates Paragraphs 1 through 16 of the defendant's Third Defense by reference.

2. That at no time prior to or subsequent to entering into a contract with the plaintiff Atlantic Purchasers, Inc., for the lease-purchase of the Cessna

aircraft, herein before mentioned, did the defendant as officer and agent of defendant Aircraft Sales, Inc., make any representation to the plaintiffs in writing and executed pursuant to the Statute of Frauds, as to the fair market value of the Cessna; therefore, any purported representation claimed by the plaintiffs to have been made is void as against this defendant.

WHEREFORE, the defendant, having fully answered the Complaint of the plaintiffs, prays the Court for the following relief:

1. That the plaintiffs have and recover nothing of the defendant and that the plaintiffs' claim be dismissed.

2. That a jury trial be granted upon all issues of fact triable by a jury.

3. That the cost of this action be taxed against the plaintiffs.

4. For such other and further relief as to the Court seems [sic] just and proper.

S/_____

William L. Sitton, Jr.
Attorney for Defendant,
Donald J. Anklin
BAILEY, BRACKETT & BRACKETT, P.A.
223 Law Building
Charlotte, North Carolina 28202
Telephone: (704) 333-8612

CERTIFICATE OF SERVICE

I, William L. Sitton, Jr., attorney for defendant Donald J. Anklin, in the above entitled action, do hereby certify that I served a copy of the foregoing Answer upon Paul D. Copenbarger, attorney for plaintiffs, by depositing a copy therof enclosed in a postpaid envelope, properly addressed to him at his office at Hicks, Maloof & Campbell, Suite 3401, 101

Marietta Tower, Atlanta, Georgia 30303, in a official depository under the exclusive care and custody of the United States Post Office Department.

This the 2nd day of October, 1979.

/S/

William L. Sitton, Jr.

CERTIFICATE OF SERVICE

I, William L. Sitton, Jr., attorney for defendant Donald J. Anklin, in the above entitled action, do hereby certify that I served a copy of the foregoing Answer upon Hugh G. Casey, Jr. attorney for plaintiffs, by depositing a copy therof enclosed in a postpaid envelope, properly addressed to him at his office at Casey & Daley, P.A., Suite 700, Law Building, Charlotte, North Carolina 28202, in an official depository under the exclusive care and custody of the United States Post Office Department.

This the 2nd day of October, 1979.

/S/

William L. Sitton, Jr.

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NORTH CAROLINA

CHARLOTTE DIVISION

CC 79-204

ATLANTIC PURCHASERS, INC.

and

STELLA MARIS INN, LTD.,

Plaintiff,

v. ANSWER

AIRCRAFT SALES, INC. (JURY TRIAL DEMAND)

and

DONALD J. ANKLIN,:

Defendant.

NOW COMES AIRCRAFT SALES, INC., answering the Complaint of the plaintiffs, and alleges and says:

FIRST DEFENSE

That the Complaint fails to state a claim for relief against Aircraft Sales, Inc. upon which relief can be granted.

SECOND DEFENSE

1. That upon information and belief, the allegations contained in Paragraph 1 of the plaintiffs' Complaint are admitted.

2. That upon information and belief, the allegations contained in Paragraph 2 of the plaintiffs' Complaint are admitted.

3. That the allegations as to Aircraft Sales, Inc., being a North Carolina corporation are admitted. The defendant denies that its principal place of business is located at Douglas Airport, Charlotte, North Carolina.

4. That the allegations contained in Paragraph 4 of the plaintiffs' Complaint are admitted.

5. That the allegations contained in Paragraph 5 of the plaintiff's Complaint are admitted.

6. That the allegations contained in Paragraph 6 of the plaintiffs' Complaint are admitted.

7. That upon lack of information and belief, the allegations contained in Paragraph 7 of the plaintiffs' Complaint as to plaintiff Stella Maris supplying the cash necessary for the purchase of the Beechcraft as well as their beneficial ownership of the Piper are denied. That upon lack of information and belief as to the amount of money which Stella Maris expended in repairing, modifying, and improving the Beechcraft aircraft, said allegations are denied. The defendant specifically denies that the Beechcraft airplane was purchased from the defendant

Anklin. All other allegations contained in Paragraph 7 of the plaintiffs' complaint are admitted.

8. That the allegations contained in Paragraph 8 of the plaintiffs' Complaint are denied.

9. That the allegations contained in Paragraph 9 of the plaintiffs' Complaint are denied.

10. That the allegations contained in Paragraph 10 of the plaintiffs' Complaint as to the defendant Anklin's inability to convey good title to the Beechcraft to the plaintiff, is denied upon lack of information and belief. All other allegations contained in Paragraph 10 of the plaintiffs' Complaint are admitted.

11. That the allegations contained in Paragraph 11 as to any agreement by defendant Anklin and delivery to defendant Anklin,are denied upon lack of information and belief. That the defendant denies the

date upon which the plaintiffs claim an agreement was entered into by the plaintiffs and defendant. All other allegations contained in Paragraph 11 of the plaintiffs' Complaint are admitted.

12. That the defendant admits that at the time of the delivery of the Cessna by the defendant to the plaintiffs, the defendant was informed and believed that the Cessna was in accordance with the operating and maintenance history contained in its legal documentation. All other allegations contained in Paragraph 12 of the plaintiffs' Complaint are denied.

13. That the allegations contained in Paragraph 13 of the plaintiffs' Complaint are denied.

14. That it is admitted that following temporary repairs by the defendant as agent, Donald J. Anklin, the Cessna was delivered to Aircraft Sales,

Inc. for repairs with the authorization and approval of the plaintiffs. All other allegations contained in Paragraph 14 of the plaintiffs' Complaint are denied.

15. That the allegations contained in Paragraph 15 of the plaintiff's Complaint in reference to the defendant Aircraft Sales are admitted. Upon lack of information and belief, the allegations contained in Paragraph 15 as to defendant Anklin, are denied.

16. That the allegations contained in Paragraph 16 of the plaintiffs' Complaint are admitted.

17. That the allegations contained in Paragraph 17 of the plaintiff's Complaint as to this defendant are denied. That upon lack of information and belief the allegations contained in Paragraph 17 as to knowledge of defendant Anklin are denied.

18. That the allegations contained in Paragraph 18 as to either defendant's refusal to correctly repair the Cessna are denied. That the defendant, Aircraft Sales, admits that it refused to release the Cessna until the entire amount of $27,465.05 claimed by the defendant to be due was paid. That the allegations contained in Paragraph 18 as to the defendant Anklin's actions are denied upon lack of information and belief.

19. That the defendant denies disposing of the Cessna in an unreasonable manner in the violation of the rights and interest of the plaintiffs. The defendant admits that no accounting for any proceeds from the Cessna have been made to the plaintiffs. Upon lack of information and belief, the defendant denies any allegations as to the conduct of defendant Anklin.

20. That the allegations contained in Paragraph 20 of the plaintiffs' Complaint are denied.

21. That the allegations contained in Paragraph 21 of the plaintiffs' Complaint are denied.

22. That the allegations contained in Paragraph 22 of the plaintiffs' Complaint are denied.

23. That the allegations contained in Paragraph 23 of the plaintiffs' Complaint are denied.

THIRD DEFENSE

As a further defense and answer to the plaintiff's Complaint, the defendant, Aircraft Sales, Inc., alleges and says:

1. That the allegations contained in Paragrahs 1 and 2 of the plaintiffs' Complaint are herein incorporated by reference.

2. That the defendant, Aircraft Sales, Inc., (hereinafter "Aircraft

Sales") is a North Carolina corporation with its principal place of business in Iredell County, North Carolina.

3. That the allegations contained in Paragraph 4 of the plaintiffs' Complaint are herein incorporated by reference.

4. That at the time the plaintiff Atlantic Purchasers purchased a 1955 Beechcraft Model BE18S bearing registration number N426SF (hereinafter referred to as "Beechcraft"), the plaintiffs were aware of a possible defect in the title to the Beechcraft. That despite said notice, the plaintiffs entered into the purchase of the Beechcraft from the defendant in the hope that good title could be delivered from the party from whom the defendant had purchased said airplane; that the plaintiffs' agent, Jorge Friese, and the defendant exerted all efforts to procure good title from a Tennessee bank, which

had prior ownership of the Beechcraft; that despite all efforts, good title could not be obtained for the Beechcraft.

5. That upon plaintiff's own admission in their Complaint, the plaintiffs and the defendant agreed to a novation of the prior sale between the parties and the plaintiffs voluntarily agreed to defendants' proposal to accept the Beechcraft in trade on a lease purchase of a 1965 Cessna Model SN411 bearing registration number N190X (hereinafter referred to as the "Cessna"), in settlement over said title dispute to the Beechcraft.

6. That on August 23, 1979, plaintiff Atlantic Purchasers executed a bill of sale to the defendant Aircraft Sales conveying any and all right, title, and interest which the plaintiff may have had in the Beechcraft to the defendant.

7. That on August 21, 1976, plaintiff Atlantic Purchasers and the defendant Aircraft Sales entered into a lease-purchase agreement of the Cessna aircraft; said lease is attached to the defendant's Answer, marked as Exhibit A, and is herein incorporated by reference. That at the time the lease-purchase agreement was entered into between the plaintiffs and Aircraft Sales, Aircraft Sales in Paragraph 8 of the lease-purchase agreement, expressly disclaimed any warranties of merchantability or fitness for any particular purpose; the plaintiff Atlantic Purchasers, as lessee, further agreed in said lease-purchase agreement that the lessor shall not be responsible for any loss or consequential damages due to engine failure or mechanical or structural breakdown of any sort or from any cause. Furthermore, in Paragraph 9 of said lease-purchase agreement, Atlantic

Purchasers, as lessee, agreed that "such maintenance and repairs as are performed by lessors, shall be billed to the lessee, who agrees to pay such bills in addition to and as part the next rental payment due."

8. That in November of 1976, defendant was contacted by plaintiff Atlantic Purchasers, and was informed that the Cessna had experienced engine failure in one of its two engines; that plaintiff Atlantic Purchasers requested the defendant to come to Nassau, where the aircraft was located, to inspect the Cessna; that on or about December 2, 1976, the defendant's officer and agent, Donald J. Anklin, traveled to Nassau and inspected the Cessna; that upon inspection, defendant's officer and agent, Donald J. Anklin, determined that extensive damage had been done to the aircraft's engine due to the over-boosting

of one engine; that an extended flight following the over-boosting of one engine resulted in excessive cylinder head pressure in the second engine causing partial failure of that engine; that these damages were not the result of any pre-existing condition of the engine but rather were caused by misuse of the aircraft and pilot error.

9. That the plaintiff, Atlantic Purchasers, authorized the defendant to return the Cessna to Aircraft Sales' place of business in North Carolina, and further requested that defendant perform all work necessary to repair the damage and place the aircraft in flyable condition.

10. That in order to return the Cessna to defendant's facilities in North Carolina, defendant installed two new cylinders and performed other work necessary to fly the aircraft to Charlotte, North Carolina; that following

defendant's inspection in Nassau, defendant informed the plaintiff Atlantic Purchasers, that extensive work would be necessary and assessed the damages to the aircraft at over $20,000.00.

11. That as evidenced by plaintiffs' Complaint, plaintiff Atlantic Purchasers paid the defendant $5,150.00 as a cash advance to cover the initial repair expenses on the part of Aircraft Sales.

12. That on or about January 7, 1977, the denfendant, after completing substantial repairs to the Beechcraft in the amount of $27,476.05, mailed to the plaintiff Atlantic Purchasers an itemized bill for that amount less the $5,150.00 cash advance paid by the plaintiff to the defendant.

13. That under the terms of the lease-purchase agreement entered into between the plaintiff Atlantic Purchasers and the defendant, the plaintiff agreed to

pay a monthly rental payment in the amount of $674.94 per month for sixty months at which time plaintiff would have the option to purchase the aircraft; that plaintiff made said rental payments for the months of September and October, 1976; that as of the time the repairs were completed by defendant, plaintiff was two months in arrears on its monthly rental payments.

14. That by registered letter addressed to Mr. Richard Gray, President of plaintiff Atlantic Purchasers, Inc., said letter being attached to the Complaint, marked as Exhibit B, and is herein incorporated by reference, the defendant Aircraft Sales, through its President, Donald J. Anklin, have written notice to the plaintiff that by virtue of its failure to perform Paragraphs 3,8,9 and 10 of the lease, said lease would be terminated unless cured forthwith by the Plaintiff.

15. That neither Atlantic Purchasers, Inc. nor Stella Maris Inn, Ltd. made any attempt to correct plaintiff Atlantic Purchasers' default under the above-named paragraphs of the lease agreement; as a result, said lease was terminated by the defendant.

16. That upon termination of the lease agreement, and in accordance with Paragraph 12 and 15 of the lease agreement, the defendant satisfied a prior existing loan secured by the Cessna, the plaintiffs having knowledge of said loan, and applied the balance of monies received on behalf of the Cessna toward the plaintiff Atlantic Purchasers' outstanding repair bill in the amount of $22,326.05.

FOURTH DEFENSE

1. That the defendant, Aircraft Sales, Inc., herein incorporates Paragraphs 1 through 16 of the defenant's Third Defense by reference.

2. That any right of action which the plaintiffs have set forth in the Complaint as to any loss of use alleged to have been incurred by them as the result of their ownership of a 1955 Beechcraft Model BE18S bearing registration number N426SF accrued more than three years prior to the commencement of this action and is barred by the Statute of Limitations.

FIFTH DEFENSE

1. That the defendant, Aircraft Sales, Inc., herein incorporates Paragraphs 1 through 16 of the defendant's Third Defense by reference.

2. That on July 25, 1975, plaintiff Atlantic Purchasers, Inc., through it President, Jorge Friese, signed a sales contract with the defendant Aircraft Sales, Inc., for the purchase of a 1955 Beechcraft Model BE18S bearing registration number N426SF at the defendants' place of business in

Charlotte, North Carolina; that as part of this sales contract, it was specifically set forth by the defendant that the airplane in question was sold without warranty of any kind; that the sales contract further stated that the airplane was to be sold "on ramp as is, where is."

SIXTH DEFENSE

1. That the defendant Aircraft Sales, herein incorporates Paragraphs 1 through 16 of the defendant's Third Defense by reference.

2. That at no time prior to or subsequent to entering into a contract with the plaintiff Atlantic Purchasers, Inc., for the lease-purchase of the Cessna aircraft, herein before mentioned, did the defendant Aircraft Sales, Inc., make any representation to the plaintiffs in writing and executed pursuant to the Statute of Frauds, as to the fair market value of the Cessna; therefore, any

purported representation claimed by the plaintiffs to have been made is void as against this defendant.

WHEREFORE, the defendant, having fully answered the Complaint of the plaintiffs, prays the Court for the following relief:

1. That the plaintiffs have and recover nothing of the defendant and that the plaintiffs' claim be dismissed.

2. That a jury trial be granted upon all issues of fact triable by a jury.

3. That the cost of this action be taxed against the plaintiffs.

4. For such other and further relief as to the Court seems [sic] just and proper.

/S/ _____

William L. Sitton, Jr.
Attorney for Defendant,
Aircraft Sales, Inc.
BAILEY, BRACKETT & BRACKETT, P.A.
223 Law Building
Charlotte, North Carolina 28202
Telephone: (704) 333-8612

CERTIFICATE OF SERVICE

I, William L. Sitton, Jr., attorney for defendant Aircraft Sales, Inc., in the above entitled action, do hereby certify that I served a copy of the foregoing Answer upon Paul D. Copenbarger, attorney for plaintiffs, by depositing a copy therof enclosed in a postpaid envelope,

properly addressed to him at his office at Hicks, Maloof & Campbell, Suite 3401, 101 Marietta Tower, Atlanta, Georgia 30303, in a official depository under the exclusive care and custody of the United States Post Office Department.

This the 2nd day of October, 1979.

/S/

William L. Sitton, Jr.

CERTIFICATE OF SERVICE

I, William L. Sitton, Jr., attorney for defendant Aircraft Sales, Inc., in the above entitled action, do hereby certify that I served a copy of the foregoing Answer upon Hugh G. Casey, Jr. attorney for plaintiffs, by depositing a copy therof enclosed in a postpaid envelope, properly addressed to him at his office at Casey & Daley, P.A., Suite 700, Law Building, Charlotte, North Carolina 28202,

in an official depository under the exclusive care and custody of the United States Post Office Department.

This the 2nd day of October, 1979.

/S/

William L. Sitton, Jr.

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
Charlotte Division
C-C-79-204

ATLANTIC PURCHASERS, INC. and STELLA MARIS INN, LTD., Plaintiffs, vs. AIRCRAFT SALES, INC. and DONALD J. ANKLIN, Defendants.	FILED Sept. 14, 1981 RULE 50 MOTION FOR A DIRECTED VERDICT

NOW COMES Donald J. Anklin, defendant in the foregoing action, and moves the Court pursuant to Rule 50(a) of the Rules of Civil Procedure for a directed verdict at the close of the evidence offered by plaintiff in this action as to plaintiff's claim for punitive damages as to this defendant; that in support of said motion, the following specific grounds are set forth:

(a) Plaintiff is not entitled to punitive damages as a matter of law in the breach of contract action presently before the Court.

(b) Plaintiff's evidence does not support such alleged breach of contract as being willful, malicious, or oppressive.

(c) Plaintiff's evidence does not support the existence of fraud in this matter as a distinct and identifiable tort.

(d) Plaintiff's evidence does not support the existence of aggravated fraud in this case.

WHEREFORE, the defendant Donald J. Anklin prays that the Court strike the plaintiff's claim for punitive damages as to this defendant for the above stated grounds.

This the _____ day of September, 1981.

BAILEY, BRACKETT
& BRACKETT, P.A.

By: _____
William L. Sitton,Jr.
Suite One,
Equity Building
701 East Trade St.
Charlotte, NC 28202
Telephone:
(704) 333-8612
Attorney for
Defendant
Donald J. Anklin

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
Charlotte Division

ATLANTIC PURCHASERS, INC., and STELLA MARIS INN, LTD., Plaintiffs, vs. AIRCRAFT SALES, INC., and DONALD J. ANKLIN, Defendants.	FILED Sept. 14, 1981 C-C-79-204 MOTION OF THE DEFENDANT DONALD J. ANKLIN FOR A DIRECTED VERDICT

NOW COMES DONALD J. ANKLIN, defendant in the foregoing action, and moves the Court pursuant to Rule 50(a) of the Rules of Civil Procedure for a directed verdict at the close of the evidence offered by the plaintiffs in this action as to the plaintiffs' claim for relief against this defendant; and in support of said Motion, the following specific grounds are set forth:

1. Plaintiffs have failed to pro-

duce any probative evidence to show that the defendant, Donald J. Anklin, contracted with the plaintiffs in his individual capacity.

2. Plaintiffs have failed to produce any probative evidence to show that the defendant, Donald J. Anklin, is the alter ego of Aircraft Sales, Inc.

WHEREFORE, the defendant, Donald J. Anklin, prays that the Court enter an Order directing a verdict in favor of said defendant and dismiss this action as to him.

This the _____ day of September, 1981.

BAILEY, BRACKETT
& BRACKETT, P.A.

By: _____

William L. Sitton,Jr.
Suite One,
Equity Building
701 East Trade St.
Charlotte, NC 28202
Telephone:
(704) 333-8612
Attorney for
Defendant
Donald J. Anklin

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion of the Defendant, Donald J. Anklin, for a Directed Verdict was duly served this the _____ day of September, 1981, by hand delivering a copy of same to plaintiffs' counsel, Paul D. Copenbarger.

_____

William L. Sitton,Jr.

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
Charlotte Division
C-C-79-204

ATLANTIC PURCHASERS, INC., and STELLA MARIS INN, LTD., Plaintiffs, vs. AIRCRAFT SALES, INC., and DONALD J. ANKLIN, Defendants.	FILED Sept. 14, 1981 ISSUES

1. Did the defendants expressly represent or warrant to plaintiffs that the Cessna airplane had recently undergone a 100-hour inspection and had had only the major repairs and only the amounts of hours on its engine and air frame that were recorded in the aircraft log books?

ANSWER: Yes

2. If so, did the plaintiffs rely upon those representations or warranties or

any of them, and did they become a part of the bargain between the plaintiffs and the defendants?

ANSWER: Yes

3. Did the defendants breach or fail to make good on those express Warranties?

ANSWER: Yes

4. If so, in what amount, if any, were the plaintiffs damaged

(a) By costs of inspections and attempted repairs and by loss of what they paid the defendants?

ANSWER: $22,000.00

(b) By incidental damages in the form of losses incurred during the time reasonably required to obtain a replacement airplane?

ANSWER: $9,000.00

5. [THIS ISSUE IS TO BE ANSWERED ONLY IF YOU HAVE ANSWERED THE FIRST ISSUE IN

FAVOR OF THE PLAINTIFFS AND HAVE ALREADY AWARDED THE PLAINTIFFS SOME AMOUNT OF DAMAGES.] If so, were the representations of the defendants knowingly and wilfully made with knowledge of their falsity and with the intention that the plaintiffs would rely upon them, and did the plaintiffs in fact rely upon them to their detriment?

6. If so, what amount, if any, are the plaintiffs entitled to recover as punitive damages?

ANSWER: Yes

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE WESTERN DIVISION OF
NORTH CAROLINA
Charlotte Division
C-C-79-204

ATLANTIC PURCHASERS, INC., and STELLA MARIS INN, LTD.,	)	
Plaintiffs,	)	
vs.	)	MOTION
AIRCRAFT SALES, INC., and DONALD J. ANKLIN,	)	
Defendants.	)	

NOW COME the defendants in the above-captioned matter, Aircraft Sales, Inc. and Donald J. Anklin, and move the Court pursuant to Rule 50(b) of the Federal Rules of Civil Procedure for a Judgment notwithstanding the verdict and, in the alternative, to grant a new trial and respectfully show unto the Court as follows:

1. The trial of this case commenced

on the 9th day of September, 1981. Defendants' Motion for Directed Verdict made at the close of all the evidence was denied and a verdict was rendered by the jury thereon on the 14th day of September, 1981.

2. The nature of this action is breach of contract involving the sale of a used aircraft by the defendants to the plaintiffs.

3. The jury rendered a verdict as follows:

(a) Did the defendants expressly represent or warrant to plaintiffs that the Cessna airplane had recently undergone a 100-hour inspection and had had only the major repairs and only the amounts of hours on its engine and air frame that were recorded in the aircraft log books?

ANSWER: Yes

(b) If so, did the plaintiffs rely upon those representations or

warranties or any of them, and did they become a part of the bargain between the plaintiffs and the defendants?

ANSWER: Yes

(c) Did the defendants breach or fail to make good on those express warranties?

ANSWER: Yes

(d) If so, in what amount, if any, were the plaintiffs damaged:

(i) By costs of inspection and attempted repairs and by loss of what they paid the defendants?

ANSWER: $9,000.00. [sic]

(ii) By incidental damages in the form of losses incurred during the time reasonably required to obtain a replacement airplane?

ANSWER: $22,000.00. [sic]

(e) THIS ISSUE IS TO BE ANSWERED ONLY IF YOU HAVE ANSWERED THE FIRST ISSUE IN FAVOR OF THE PLAINTIFFS AND HAVE ALREADY AWARDED THE PLAINTIFFS SOME AMOUNT OF DAMAGES. If so, were the representations of the defendants knowingly and wilfully made with knowledge of their falsity and with the intention that the plaintiffs would rely upon them, and did the plaintiffs in fact rely upon them to their detriment?

ANSWER: Yes.

(f) If so, what amount, if any, are the plaintiffs entitled to recover as punitive damages?

ANSWER: $15,000.00.

4. This verdict and Judgment entered thereon should be set aside for the following reasons:

(a) The uncontroverted evidence introduced at trial showed that

the plaintiff, through its agent and president, Jorg Friese, entered into a written lease purchase contract for the sale of the plane in question.

(b) That the defendants' agent read the lease agreement prior to signing it.

(c) That the lease purchase agreement entered into was discussed in detail by the parties in the plaintiffs' attorney's office prior to the execution of the agreement.

(d) That the contract clearly and expressly disclaimed any express warranty relating to the condition of the Cessna aircraft in any manner.

(e) That the express warranty was phrased exactly as suggested by the Uniform Commercial Code Disclaimer incorporated by the General Statutes of North Carolina.

(f) The uncontroverted evi-

dence introduced at trial indicated that the plaintiffs had full opportunity to inspect the aircraft and its accompanying logs.

(g) Any evidence as to incidental damages incurred by the plaintiff was so speculative in its form and unsubstantiated in the evidence as to be incompetent to support any award of incidental damages by the jury.

(h) That any evidence introduced by the plaintiff as to costs of inspections and attempted repairs and by loss of what plaintiffs paid to defendants was so speculative and unsubstantiated in the evidence as to be incompetent to form the basis for any award by the jury for such damages.

(i) The uncontroverted evidence introduced at trial did not indicate or suggest in any manner that the defendants made any express war-

ranties as to the condition of the aircraft in question.

(j) The uncontroverted evidence introduced at trial does not indicate or intimate in any way that the defendants breached or failed to make good on any alleged express warranty made by the defendants.

(k) The uncontroverted evidence introduced at trial does not indicate any fraud on the part of the defendants either in representations made to the plaintiffs or otherwise.

(l) The uncontroverted evidence introduced at trial does not indicate that the plaintiffs in any way relied upon any representations made by the defendants to the plaintiffs.

(m) The uncontroverted evidence introduced at trial does not indicate that the plaintiffs suffered

any damages as a result of any representations made by the defendants to the plaintiffs.

(n) The uncontroverted evidence introduced at trial does not indicate that the defendants made any false statement concerning the plane to the plaintiffs knowing it to be false.

WHEREFORE, Movants pray the Court to set aside the verdict rendered herein for the above reasons and the Judgment entered thereon, and further to enter Judgment for Movants in accordance with their previous Motion for Directed Verdict or, in the alternative, to grant a new trial in this matter.

This the 7 day of October, 1981.

BAILEY, BRACKETT
& BRACKETT, P.A.

By_____
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Equity Building
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Charlotte, NC 28202
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(704) 333-8612

Attorney for
Defendants

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
Carlotte Divsion
C-C-79-204

ATLANTIC PURCHASERS, INC. and STELLA MARIS INN, LTD.,	)
Plaintiffs,	)
vs.	)
AIRCRAFT SALES, INC. and DONALD J. ANKLIN,	)
Defendants.	)

Plaintiffs' Memorandum of Law
Regarding Treble Damages
Under G.S. 75-1.1 and
G.S. 75-16

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I. STATEMENT OF FACTS

Plaintiffs in this case prevailed in the above entitled action against the defendants on the basis of fraud in a verdict rendered September 14, 1981. The issues submitted to the jury and their findings were, in their entirety, as follows:

1. Did the defendants expressly represent or warrant to plaintiffs that the Cessna airplane had recently undergone a 100-hour inspection and had had ony the major repairs and only the amounts of hours on its engines and air fram that were recorded in the aircraft log books?

ANSWER: YES

2. If so, did the plaintiffs rely upon those representations or warranties or any of them, and did they become a part of the bargain between the plaintiffs and the defendants?

ANSWER: YES

3. Did the defendants breach or fail to make good on those express warranties?

ANSWER: YES

4. If so, in what amount, if any, were the plaintiffs damaged:

(a) By costs of inspections and attempted repairs and loss what they paid the defendants?

ANSWER: $22,000.00

(b) By incidental damages in the form of losses incurred during the time reasonably required to obtain a replacement airplane?

ANSWER: $9,000.00

5. [THIS ISSUE IS TO BE ANSWERED ONLY IF YOU HAVE ANSWERED THE FIRST ISSUE IN FAVOR OF THE PLAINTIFFS AND HAVE ALREADY AWARDED THE PLAINTIFFS SOME AMOUNT OF DAMAGES.] If so, were the representations of the defendants knowingly and wilfully made with knowledge of their falsity and with the intention that the plaintiffs would rely upon them,

and did the plaintiffs in fact rely upon them to their detriment?

ANSWER: YES

6. If so, what amount, if any are the plaintiffs entitled to recover as punitive damages?

ANSWER: $15,000.00

On the basis of the above findings by the jury the plaintiffs are entitled, as a matter of law, to treble the amount of damages awarded by the jury in Issue number 4, subsection (a) and (b), under North Carolina General Statutes Section 75-1.1 and 75-16 (herein referred to as G.S. 75-1.1 and 75-16). This brief addresses itself to the issue of whether proof of fraud necessarily constitutes a violation of G.S. 75-1.1; whether proof of fraud or bad faith is required for violation of G.S. 75-1.1; and whether upon proof of a violation, an award of treble damages is automatically given as a matter

of right or is a matter of discretion of the judge.

II. ARGUMENT

A. THE INTENT OF THE LEGISLATURE IN ENACTING G.S. 75-1.1 WAS TO DECLARE DECEPTIVE ACTS AND PRACTICES UNLAWFUL, TO PROVIDE TREBLE DAMAGES FOR THOSE INJURED, AND TO ENCOURAGE FAIR DEALINGS

North Carolina General Statutes section 75-1.1 provides, in part:

> "Methods of competition, acts and practices regulated; legislative policy. (a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, or declared unlawful.
> (b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession."

Further, G.S. 75-16 provides for a civil action by the person so injured, and for treble the amount of damages fixed by a verdict. It states:

> "If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of

> the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such innury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict."

The intent of the Legislature in enacting the above sections was to enable a person injured by deceptive acts or practices ot recover treble damages from the wrongdoer, to declare such acts unlawful, and to encourage ethical standards in dealings between persons engaged in business and consuming public. North Carolina State ex rel. Edmister v. J.C. Penny Co., 30 N.C. App. 368, 227 S.E.2d 141 (1976), rev'd on other grounds, 292 N.C. 311, 233 S.E.2d 895 (1977); Hardy v. Tolar, 288 N.C. 303, 218 S.E.2d 342 (1975).

In the present case plaintiffs have proved, as shown by the findings of the jury and its verdict, that defendants made

misrepresentations regarding the maintenance history, repairs and hours on the engines and airframe of the Cessna aircraft which is the subject of this case; that such representations were made wilfully and knowingly by the defendants with knowledge of their falsity; and that defendants intended for plaintiffs to rely thereon to induce the plaintiffs to take delivery of the aircraft and that plaintiffs did in fact rely thereon to their detriment.

The acts which the jury found defendants had committed with regard to the lease of the Cessna aircraft are precisely the kinds of unfair or deceptive acts or practices in or affecting commerce which the legislature has declared to be unlawful under G.S. 75-1.1, and for which it has made provision for treble damages under G.S. 75-16.

B. PROOF OF FRAUD NECESSARILY CONSTITUTES A VIOLATION OF THE PROHIBITION AGAINST UNFAIR AND DECEPTIVE ACTS AS A MATER OF LAW

The cases involving G.S. 75-1.1 have consistently held that, procedurally, the jury makes findings of facts including all factual determinations regarding defentant's conduct. Based on those findings the court must determine as a matter of law whether defendant's acts, as found by the jury violates the statute. Hardy v. Tolar, 288 N.C. 303, 218 S.E.2d 342 (1975); Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977), cert denied, 294 N.C. 441, 241 S.E.2d 843 (1978). Whether an act or practice is unfair or deceptive within the meaning of G.S. 75-1.1 is a question of law for the court to determine. Wachovia Bank & Trust Co. v. Smith, 44 N.C. App. 685, 262 S.E.2d 646, cert. denied, 300 N.C. 379, 267 S.E.2d 685 (1980); CF Indus., Inc. v Transcontinental

Gas pipe Line Corp., 448 F. Supp. 475 (W.D. N.C. 1978).

In the present case plaintiffs have proved, as shown by the findings of the jury and its verdict, that defendants made misrepresentations regarding the maintenance history, repairs and hours on the engines and airframe of the Cessna aircraft which is the subject of this case; that such representations were made wilfully and knowingly by the defendants with knowledge of their falsity; and that defendants intended for plaintiffs to rely thereon to induce the plaintiffs to take delivery of the aircraft and that plaintiffs did in fact rely thereon to their detriment. Thus, the jury found that the defendants misrepresented the airplane and further that those misrepresentations were a fraudulent deceptions. The North Carolina Supreme Court has already squarely held that fraud

is, as a matter of Law, a violation of the statute:

> "Proof of fruad would necessarily constitute a violation of the prohibition against unfair and deceptive acts; however, the converse is not always true." Hardy v. Tolar, supra, at 346. (Emphasis supplied)

The court concluded that:

> ". . . [W]e hold as a matter law that the false representations made by defendants to plaintiff constituted unfair or deceptive acts or practices in commerce contrary to the provisions of G.S. 75-1.1, and treble damages should have been awarded as provided by G.S. 75-16 . . . "Id. at 347.

In Kent v. Humphries, ___N.C. App.___, 275 S.E.2d 176 (1981), the court in reversing the lower court's granting of defendant's motion for summary judgment, following the rationale of Hardy v. Tolar, supra. After holding that plaintiff's depositions supported her claim for fraud, the court held;

> "Plaintiff's claim for treble damages under G.S. 75-16 for unfair trade practices should have survived

defendant's motion for summary judgment. G.S. 75-1.1 defines unfair trade practices as "unfair or deceptive acts or practices in or affecting commerce." Our holding that plaintiff's depositions support her fraud claim necessitates our holding that the depositions likewise support her claim for unfair or deceptive acts or practices." Hardy v. Tolar, 288 N.C. 303, 218 S.E.2d 342 (1975)." (Emphasis supplied)

In this case the jury found that defendants had made express representations regarding the maintenance history, reparis and hours on the aircraft's engines and air frame as recorded in the aircraft log books (Issue1); that plaintiffs relied upon those representations or warranties (Issue 2), and that defendants failed to make good on those representations or warranties (Issue 3); and that the misrepresentations made by the defendants were made knowingly and wilfully with intent that the misrepresentation be relied upon by plaintiffs. This is the definition of fraud. Plaintiffs were awarded thirty-one thousand dollars ($31,000.00) in actual damages and fiftenn-thousand dollars ($15,000.00) in punitive damages by the jury on the basis of its fundings. Thus, the plaintiffs in this case having received a verdict in their favor on the basis of fraud, have necessarily shown a violation of G.S. 75-1.1 as a matter of law in accordance with the decisions in Hardy and Kent, supra.

C. ONCE A VIOLATION OF G.S. 75-1.1 IS

SHOWN, PLAINTIFFS ARE ENTITLED TO TREBLE DAMAGES AUTOMATICALLY AS A MATTER OF RIGHT

Once a violation of G.S. 75-1.1 is shown treble damages follow automatically as a matter of law. This point was clearly and emphatically made in Marshall v. Miller, ____N.C.____, 276 S.E.2d 397 (1981) where the court said:

> "Absent statutory language making trebling discretionary with the trial judge, we must conclude that the Legislature intended trebling of any damages assessed to be automatic once a violation is shown. Id. at 403 (Emphasis supplied)

Plaintiffs in this case, have shown a violation of G.S. 75-1.1 as set forth above, are, therefore, entitled to an automatic granting of treble damages.

D. A COURT MUST GRANT ALL RELIEF TO WHICH A PREVAILING PARTY IS ENTITLED, WHETHER OR NOT PRAYED FOR

Under Rule 54(c) of the Federal Rules of Civil Procedure "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled,

even if the party has not demanded such relief in his pleadings."

In U.S. v. Metro Development Corp., 61 FRD 83 (D.C. Ga. 1973) the court in discussing Rule 54(c) states:

> ". . . the relief ultimately allowed is a function of the facts as adduced during the course of the entire proceedings and is not limited by the scope of prayer in the complaint."

See also Steinmetz v. Bradbury Co. 618 F.2d 21 (C.A. Iowa 1980); Keiser v. Walsh, 188 F2d 13 (D.C. Cir. 1941).

Thus, the fact that plaintiffs did not specifically pray for treble damages, does not affect their right to the recovery of treble damages under G.S. 75-16, since Rule 54(c) specifically provides that all relief to which a party is entitled shall be granted, whether or not such relief is demanded. In any event here plaintiffs did include a general prayer for relief which properly encompasses treble damages.

III. CONCLUSION

In light of the fact that plaintiffs in this case have proven fraud, and that under the decisions in Hardy v. Tolar, supra, and Kent v. Humphries, supra, proof of fraud necessarily constitutes a violation of G.S. 75-1.1, plaintiffs are entitled to the relief provided in G. S. 75-16 for such violation, that is, treble the amount of actual damages awarded by the jury in their verdict.

Since such violation of G.S. 75-1.1 has been shown, plaintiffs are entitled to trebling of the amount of actual damages automatically, as a matter of law, as stated in Marshall v. Miller, supra.

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE WESTERN DIVISION OF
NORTH CAROLINA
Charlotte Division
C-C-79-204

ATLANTIC PURCHASERS, INC., and STELLA MARIS INN, LTD., Plaintiffs,	)	
vs.	)	MEMORANDUM
AIRCRAFT SALES, INC., and DONALD J. ANKLIN, Defendants.	)	

The verdict was rendered by a jury on the 14th day of September, 1981.

Contrary to the court's instructions, plaintiffs' counsel have not tendered a judgment on the verdict.

Defendants' counsel have not tendered a judgment on the verdict.

Plaintiffs' counsel have sought to have the court revise and treble the verdict without bothering to inform the jury

of the treble damages remedy and without bothering to allow the jury to consider any options of its own on the questions of treble damages vs. punitive damages vs. treble damages and punitive damages combined.

The equities are so confused in this case, and the law is sufficiently unclear, that I do not think anything automatic or routine should be done in the way of entry of a judgment, augmented or otherwise.

The court will await the presentation of the post-verdict issues in some form contemplated by the Rules.

This 6 day of November, 1981.

James B. McMillan
United States
District Judge

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE WESTERN DIVISION OF
NORTH CAROLINA
Charlotte Division
C-C-79-204

ATLANTIC PURCHASERS, INC., and STELLA MARIS INN, LTD., Plaintiffs,	)	
vs.	)	MOTION UNDER
AIRCRAFT SALES, INC., and DONALD J. ANKLIN, Defendants.	)	RULE 15

Plaintiffs move the Court to amend the pleadings allowing the plaintiffs to add to their complaint the following:

Based upon the allegations of the complaint, the defendants have violated N.C. General Statute 75-1.1. Demand for relief is amended by adding the following:

That the Court treble the amount of damages fixed by the verdict of the jury;

That the Court award plaintiffs their attorneys' fees in accordance with N.C.G.S. 75-16.1.

Respectfully submitted this 18 day of November, 1981.

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IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE WESTERN DIVISION OF
NORTH CAROLINA
Charlotte Division
C-C-79-204-M

ATLANTIC PURCHASERS, INC., and STELLA MARIS INN, LTD.,	)	FILED
Plaintiffs,	)	January 26, 1982
vs.	)	ORDER
AIRCRAFT SALES, INC., and DONALD J. ANKLIN,	)	
Defendants.	)	

A hearing was conducted on January 13, 1982, at which the court attempted to coerce the parties into a Gordian knot resolution by way of settlement of the issues in this case which can not be decently resolved on any clear-cut basis of a strictly legal nature.

The court is still of the opinion that it is procedurally and equitably indecent to convert the case after the verdict into

a suit under the North Carolina Unfair Trade Practices Act with its attendant remedies of treble damages plus attorneys' fees.

Somehow I continue to think that a litigant faced with treble damages -- plus attorneys' fees -- instead of with punitive damages without attorneys' fees -- should be informed about that threat before the case is tried; it could very well have a lot to do with all kinds of considerations, including settlement negotiations, trial strategy of presenting or not presenting evidence, and so on.

I therefore concluded that I should either sign a judgment on the verdict as rendered, or if both parties so requested, I should set aside the verdict and try the case all over again after an additional time for whatever supplemental pleading and preparation the parties might desire.

The parties were instructed to advise

the court by January 25, 1982, whether or not they all join in motions for an order setting aside the entire verdict and directing a new trial. They have not so advised the court. It is therefore time to rule on all pending motions, and those motions are decided as follows:

1. The motion of the defendants that the court set aside the verdict and enter judgment for defendants notwithstanding the verdict is denied.

2. The motion of the defendants for a new trial is denied.

3. The motion of the plaintiffs filed November 23, 1981, requesting leave to amend the pleadings to allege violations of the North Carolina Unfair Trade Practices Act is denied.

4. The motion of the plaintiffs filed November 23, 1981, requesting the court to treble the amount of damages is denied.

5. The motion of the plaintiffs for an award of attorneys' fees is denied.

6. On the day the verdict was rendered, September 14, 1981, the court directed counsel for the plaintiffs to submit a judgment on the verdict within ten days. In the order of November 6, 1981, the court referred to those earlier instructions. No such judgment has been tendered, and interest at a high rate is wasting. The court therefore will enter a judgment on the verdict by separate document.

IT IS SO ORDERED, this 26 day of January, 1982.

James B. McMillan
United States
District Judge

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
Charlotte Division
C-C-79-204-M

ATLANTIC PURCHASERS, INC., and STELLA MARIS INN, LTD., Plaintiffs,	)	FILED January 26, 1982
-vs-	)	JUDGMENT
AIRCRAFT SALES, INC., and DONALD J. ANKLIN, Defendants.	)	

This case was tried before the undersigned district judge and a jury on September 9, 10, 11 and 14, 1981. Issues were submitted to and answered by the jury as follows:

1. Did the defendants expressly represent or warrant to plaintiffs that the Cessna airplane had recently undergone a 100-hour inspection and had had only the major repairs and

only the amounts of hours on its engines and air frame that were recorded in the aircraft log books?

ANSWER: Yes

2. If so, did the plaintiffs rely upon those representations or warranties or any of them, and did they become a part of the bargain between the plaintiffs and the defendants?

ANSWER: Yes

3. Did the defendants breach or fail to make good on those express warranties?

ANSWER: Yes

4. If so, in what amount, if any, were the plaintiffs damaged

(a) By costs of inspections and attempted repairs and by loss of what they paid the defendants?

ANSWER: $22,000.00

(b) By incidental damages in the form of losses incurred during the time reasonably required to obtain a replacement airplane?

ANSWER: $9,000.00

5. [THIS ISSUE IS TO BE ANSWERED ONLY IF YOU HAVE ANSWERED THE FIRST ISSUE IN FAVOR OF THE PLAINTIFFS AND HAVE ALREADY AWARDED THE PLAINTIFFS SOME AMOUNT OF DAMAGES.] If so, were the representations of the defendants knowingly and wilfully made with knowledge of their falsity and with the intention that the plaintiffs would rely upon them, and did the plaintiffs in fact rely upon them to their detriment?

ANSWER: Yes

6. If so, what amount, if any, are the plaintiffs entitled to recover as punitive damages?

ANSWER: $15,000.00

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED, that plaintiffs recover of defendants the sum on Forty-Six Thousand Dollars and the costs of this action.

This 26 day of January, 1982.

James B. McMillan
United States
District Judge

Atlantic Purchasers, Inc.,
Stella Maris Inn, Ltd., Appellants

v.

Aircraft Sales, Inc.,
Donald J. Anklin, Appellees.

Nos. 82-1199(L), 82-1200, 82-1322.

United States Court of Appeals,
Fourth Circuit

Argued Dec. 9, 1982

Decided April 14, 1983

Before ERVIN and CHAPMAN, Circuit Judges, and BRYAN, Senior Circuit Judge.

ERVIN, Circuit Judge:

Stella Maris Inn, Ltd., and its wholly owned subsidiary, Atlantic Purchasers, Inc., brought this diversity action for fraud and breach of express warranty against Aircraft Sales, Inc., and its sole stockholder, Donald J. Anklin.[1]

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[1]Stella Maris and Atlantic Purchasers will

The jury awarded Stella Maris compensatory and punitive damages, and after the verdict was returned Stella Maris unsuccessfully requested the trebling of the compensatory award pursuant to the North Carolina Unfair Trade Practices Act of 1969, N.C.G.S. §§ 75-1.1, 75-16. Both Stella Maris and Aircraft Sales appeal. Finding no error in the district court's judgment, we affirm.

I.

In 1975, Stella Maris bought a Beechcraft airplane from Aircraft Sales. It allegedly spent $25,000.00 modifying the plane before Aircraft Sales acknowledged that it could not convey good title. Aircraft Sales then suggested that

be referred to collectively as "Stella Maris," Aircraft Sales and Anklin as "Aircraft Sales." Where the individual appellee Donald Anklin alone is meant, his name will be used.

it take back the plane and give Stella Maris credit for it toward the purchase of a Cessna. Anklin personally travelled to Florida to meet with Stella Maris' agent, where the parties prepared a draft agreement after Anklin made specific representations about the Cessna's mechanical condition and age. These representations were confirmed by the plane's log books on actual inspection of the plane in North Carolina, where, on August 21, 1976, Stella Maris and aircraft Sales signed a lease purchase agreement. The agreement included a specific disclaimer of all warranties not described on its face. Stella Maris contends that this disclaimer was not part of the draft agreement, which, its agent was assured by Aircraft Sales, was identical to the proffered document. Within three weeks of delivery the Cessna suffered engine failure. Aircraft Sales performed repair

work on the engines and submitted a bill that Stella Maris claims was grossly inflated. When Stella Maris refused to pay the bill, Aircraft Sales kept the plane. The present litigation ensued.

A trial, Stella Maris presented evidence indicating that the Cessna's engines had been operated for many more hours than Anklin and Aircraft Sales represented, that necessary airworthiness inspections prior to sale had not been performed as claimed and that the log books had been tampered with so as to substantiate these representations.

The jury returned a special verdict finding that Anklin and Aircraft Sales made specific representations about the condition of the Cessna which as express warranties were part of the bargain between the parties, that Stella Maris relied on these warranties, that the defendants failed to make good on the

warranties, and that Stella Maris suffered $31,000.00 in actual damages. In addition, the jury found that the defendants' representations were made with knowing and willful knowledge of their falsity and with the intent to induce reliance thereon, and that Stella Maris was entitled to recover $15,000.00 in punitive damages as a consequence. In response to the court's instructions to tender a judgment on the verdict, Stella Maris submitted a claim including a trebling of the actual damages and an award of attorneys' fees pursuant to the North Carolina Unfair Trade Practices Act ("the Act").[2] After the briefing and a hearing, the court denied Stella Maris' motion to amend its complaint and refused

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[2]Stella Maris had made no use of or reference to the Act prior to this point in the litigation.

to treble the damages. The court also denied Aircraft Sales' motions to set aside the verdict and for a new trial. The court requested the parties to determine if they would agree to a new trial with supplemental pleading and preparation. Upon their failure to do so, judgment was entered for the amount awarded by the jury.

On appeal, Stella Maris contends that the jury verdict shows that it made out a clear case under the Act and that, in accordance with Fed. R. Civ. P. 54(c), it was entitled to treble actual damages and to attorneys' fees. It also argues that the district court should have permitted amendment of the pleadings pursuant to Fed. R. Civ. P. 15(a). It denies that the award of punitive damages is inconsistent with treble damages under the Act, and suggests that if it is inconsistent, the punitive damages should be eliminated and

the actual damages trebled.

Aircraft Sales' position as appellee is that it was not put on notice of the possibility of treble damages prior to Stella Maris' post-verdict moves, that there was no evidence on essential elements of proof under the Act, and that Sellla Maris has elected a punitive damages remedy to the exclusion of treble damages. As cross-appellant, Aircraft Sales contends that the court erred in submitting the breach of express warranty issue to the jury, and that, assuming fraud was properly submissible, the court erred in failing to charge the jury that Stella Maris' reliance on representations had to be reasonable. Donald Anklin also disputes the propriety of holding him personally liable.

II.

[1-3] At the time the events which gave rise to this litigation occurred, the North Carolina Unfair Trade Practices Act Stated:

> Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

N.C.G.S. §75-1.1(a) (1969).[3] The Act may be enforced by civil actions brought by the state attorney general, N.C.G.S. §§

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[3]The Act subsequently was rewritten to eliminate the reference to "trade" and to define "commerce" as "all business activites, however denominated," except certain professional services. N.C.G.S. §75-1.1(b) (1977). This revision, which expanded the scope of the act, should not be applied retroactively. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1049, 1057 (E.D.N.C. 1980), aff'd, 649 F.2d 985 (4th Cir. 1981).

75-15.1, 75-15.2, and also confers a private right of action on an injured party, N.C.G.S. §75-16. In a private enforcement action, a prevailing plaintiff is entitled to have the damages assessed by the jury trebled. Id. The award of treble damages is a right of the successful plaintiff and is not subject to judicial discretion. Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397, 402 (N.C. 1981).

[4-7] The procedure to be followed in a private action is bifurcated. "Ordinarily it would be for the jury to determine the facts, and based on the jury's finding, the court would then determine as a matter of law whether the defendant engaged in unfair or deceptive acts or practices in the conduct of trade or commerce." Hardy v. Toler, 288 N.C. 303, 218 S.E.2d 342, 346-47 (N.C. 1975). The elements of "unfairness" and

"deceptiveness" are defined broadly: "[a] practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.... [A] practice is deceptive if it has the capacity or tendency to deceive; proof of actual deception is not required." Marshall, 276 S.E.2d at 403. Good faith is no defense to an alleged violation of the Act. Id. "Proof of fraud would necessarily constitue a violation of the [Act]." Hardy, 218 S.E.2d at 346. On the other hand, mere intentional breach of a valid contract is not, without more, a violation. United Roasters, 649 F.2d at 992. The "trade or commerce" requirement of the Act in its 1976 form is met by demonstrating that the parties were engaged in an activity involving "an exchange of some type... in which a

participant could be characterized as a seller." Johnson v. Phoenix Mutual Life Ins. Co., 300 N.C. 247, 266 S.E.2d 610, 620 (N.C. 1980).

[8] It appears that the jury's special verdict would support a finding of Aircraft Sales' liability under the Act. The jury specifically found that the defendants made representations about the Cessna's condition with knowledge of their falsity, and that Stella Maris relied on those representations. This finding encompasses the elements of the action of deceit or fraud, see Newton v. Standard Fire Ins. Co., 291 N.C. 105, 229 S.E.2d 297, 302(N.C, 1976), and. as a matter of law, the commission of fraud in these circumstances constitued a violation of the Act. Had Stella Maris brought this case under the Act, we may assume it would have been entitled to treble damages.[4]

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[4]Stella Maris, of course, would not be entitled to both compensatory damages on a common law contract theory and a statutory treble damages award. See Marshall v. Miller, 47 N.C. App. 530, 268 S.E.2d 97, 103 (N.C. App. 1980), modified on other grounds, 302 N.C. 539, 276 S.E.2d 397 (N.C. 1981); Abernathy v. Ralph Squires Realty Co., 55 N.C.App.1982 354, 285 S.E.2d 325, 327 (N.C.App.1982). We also doubt that North Carolina courts would unhold an award of punitive damages for the tort of deceit along with one of treble damages for the statutory violation. The state supreme court in Marshall described the Act's treble damages as "partially punitive in nature." 276 S.E.2d at 402. The two remedies are overlapping and, therefore, probably inconsistent, just as a breach of contract recovery and recovery under the Act are. See generally In re "Dalkon Shield" Litigation, 526 F.Supp. 887, 899 (N.D.Cal. 1981) ("overlapping damage awards violate that sense of 'fundamental fairness' which lies at the heart of constitutional due process"). In light of our federal procedural holding, see infra, we need not resolve this question of substantive state law. Stella Maris also seeks attorneys' fees pursuant to N.C.G.S. [75-16.1(1)(1973). This claim is barred because Stella Maris did not show that Aircraft Sales' refusal to settle the suit was unwarranted, proof of which is a condition precedent to recovery of attorneys' fees under the Act, id., and because Stella Maris failed to state

[9-11] In a diversity action, we are governed by the substantive law of the relevant state, but we apply federal procedual rules. Hanna v. Plumer, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed2d 8 (1965). While it is clear that under North Carolina procedure a plaintiff would not be permitted to recover statutory treble damages when it had argued and won a common law compensatory damages award, see Abernathy, 285 S.E.2d at 327-328, Stella Maris correctly asserts that its claim for treble damages must be resolved under the more liberal Federal Rules of Civil Procedure. Rule 54(c) provides

specifically the claim for fees in the complaint. Fed.R.Civ.P. 9(g)(items of special damage must be pled specifically); Maidmore Realty Co., Inc. v Maidmore Realty Co., Inc., 474 F.2d 840, 843 (3d Cir. 1973)(attorneys' fees are items of special damage for Rule 9(g) purposes).

that, except in cases of judgment by default, "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." As we stated in Robinson v. Lorillard Corporation, 444 F.2d 791, 803 (4th Cir.1971), cert. dismissed, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 665 (1971), "[t]his provision has been liberally construed, leaving no question that it is the court's duty to grant whatever relief is appropriate in the case on the facts proved." See also New Amsterdam Casualty Co. v. Waller, 323 F.2d 20,25 (4th Cir. 1963)("a party's misconception of the legal theory of his case does not work a forfeiture of his legal rights"), cert. denied, 376 U.S. 963, 84 S.Ct. 1124, 11 L.Ed.2d 981 (1964). Rule 54(c) is not, however, without its limits. A party will

not be given relief not specified in its complaint where the "failure to ask for particular relief so prejudiced the opposing party that it would be unjust to grant such relief." United States v. Marin, 651 F.2d 24,31 (1st Cir. 1981). Accord, Robinson, 444 F.2d at 803. In particular, a substantial increase in the defendant's potential ultimate liability can constitute specific prejudice barring additional relief under Rule 54(c). See, Goodman v. Poland, 395 F.Supp. 660, 685 (D.Md. 1975). We believe that this exception to the Rule is applicable in the present case.[5]

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[5]United Roasters is not the contrary. In that case, the district court improperly required the plaintiff to make an election between two alternative theories of recovery before submitting the case to the jury. 649 F.2d at 990. Stella Maris, in contrast, proceeded throughout the trial on its common law theory of recovery, introducing its statutory theory only after the jury returned its verdict.

Stella Maris' complaint gave no warning to Aircraft Sales that successful prosecution of the action could result in an awared to Stella Maris of three times Stella Maris' actual damages. This default denied Aircraft Sales and its counsel the opportunity to make a "realistic appraisal of the case, so that [their] settlement and litigation strategy [could be] based on knowledge and not speculation." Fed. R. Civ. P. 26(b)(2), Advisory Committee Notes to 1970 amendments.[6] Furthermore, Stella Maris

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[6]This rationale for the 1970 amendment of Rule 26 specifically making the existence and contents of relevant insurance policies discoverable is relevant to our construction of Rule 54(c). One of the primary purposes of modern systems of civil procedure, a purpose which has its roots in notions of fundamental fairness and due process, is to prevent the use of surprise and procedural ambush and so enable all litigants "to make the same realistic appraisal of the case." Id. (emphasis supplied).

now seeks relief on the basis of a statute creating an unusual remedy that goes beyond "the general damages the law normally awards to compensate plaintiff for the injury he seeks to have redressed." 5 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1310 (1969). Fundamental fairness requires in such a case, where the statutory remedy may increase greatly the defendant's liability, that the opposing party be notified of the possibility of the unusual relief prior to the plaintiff's tender of a proposed judgment on the verdict. Cf. Aro Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476, 491 n. 9, 84 S.Ct. 1526, 1535 n. 9, 12 L.Ed.2d 457 (1964) (defendant's failure to plead antitrust claim in patent infringement case barred its recovery of treble damages, even if it proved entitlement to them, because the claim was

never "adequately pleaded").[7] Stella Maris in its pleadings and throughout the trial sought punitive damages, not treble damages. Having selected this theory, it should not be permitted for the first time after verdict to make such a fundamental change in its strategy. It has made its legal bed and the district court was completely justified in requiring that it lie in it. In light of our conclusion that Rule 54(c) did not permit the award of treble damages to Stella Maris, it is obvious that the district court cannot be

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[7]We are unpersuaded by Stella Maris' reliance on the ad damnum clause in its complaint, which indeed requested relief greatly in excess of the actual jury award trebled. The amount of that award supports our conclusion that the ad damnum clause was inflated and would have been disregarded by competent counsel in favor of an independent assessment of Aircraft Sales' potential liability. Cf. McGowan v. Gillenwater, 429 F.2d 586, 587 (4th Cir.1970) (pleadings rarely of evidentiary value).

faulted for refusing to permit Stella Maris to amend its complaint. That formalistic procedure would have served no purpose. The prejudice to Aircraft Sales which precludes the relief Stella Maris seeks did not arise from the absence of certain words from the latter's pleadings, but from the denial to Aircraft Sales of the "illumination ... as to the substantive theory under which [Stella Maris was] proceeding," Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 66, 99 S. Ct. 383, 387, 58 L.Ed.2d 292 (1978), which is the function of the pleadings under the Federal Rules. We conclude, therefore, that the district court's refusal to treble the jury award under the facts in this case was not an abuse of discretion and should be upheld. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 424, 95 S.Ct. 2362, 2374, 45 L.Ed.2d 280 (1975) (district court's decision under Rule

reviewable only for abuse of discretion).

IV.

[12] We may dispose of the defendants' claims on their cross-appeal more briefly. Aircraft Sales contends that the express disclaimer of warranties in the lease purchase agreement absolves it of liability. However, the lease purchase agreement was for the transfer of a Cessna with certain characteristics, to be confirmed by the plane's log books. Stella Maris introduced evidence, which the jury apparently believed, that the log books were tampered with and the representation false. The parol evidence rule cannot be invoked to exclude this evidence. See 3 A.Corbin, Contracts § 580 (1960). Aircraft Sales also suggests that the district court should have charged the

jury that Stella Maris' reliance on its representations had to be reasonable to justify recovery. This contention is groundless both under the Act, Marshall, 276 S.E.2d at 403, and the common law. See Resatement (Second) of Contracts § 164, Comment d (1981).

[13,14] Anklin, finally, argues that he could not be held personally liable to Stella Maris since Aircraft Sales was the legal seller in the transaction. This argument is without merit: under North Carolina law, the corporate veil will be pierced when fraud is shown. See Huski-Bilt, Inc. v. First Citizens Bank & Trust Co., 271 N.C. 662, 157 S.E.2d 352 (N.C. 1967); Ram Textiles, Inc. v. Hillview Mills, Inc., 47 N.C.App. 593, 267 S.E.2d 700 (N.C.App.1980), disc. review denied, 301 N.C. 530, 273 S.E.2d 454 (N.C. 1980). Fraud clearly was shown here, and Anklin could be held personally liable for

the actions of his wholly owned corporation.

V.

For the foregoing reasons, the decision of the district court is affirmed.

AFFIRMED

ALBERT V. BRYAN, Senior Circuit Judge, dissenting:

Terming as "indecent" the plaintiffs' claim of trebled damages, the District Judge denied any recovery whatsoever of damages for violations of the North Carolina Unfair Trade Practices Act.[1] So

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[1]N.C.G.S. § 75-1.1 Methods of competition, acts and practice regulated; legislative policy.

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are

it is that we must inquire by whom and by what was the indecency caused.

I

Review of the evidence immediately establishes that violations of the Act, which created the right to trebled damages, were committed by the defendants. The record at once confirms this conclusion by its recital of the

hereby declared unlawful.

* * * * * * * *

N.C.G.S

§75-16: Civil action by person injured; treble damages.

If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict. (accent added)

jury's answers to the interrogatories submitted by the court. They follow:

(1) Did the defendants expressly represent or warrant to plaintiffs that the Cessna airplane had recently undergone a 100-hour inspection and had had only the major repairs and only the amounts of hours on its engines and air frame that were recorded in the aircraft log books:

ANSWER: Yes

(2) If so, did the plaintiffs rely upon those representations or warranties or any of them, and did they become a part of the bargain between the plaintiffs and the defendants?

ANSWER Yes

(3) Did the defendants breach or fail to make good on those express warranties?

ANSWER Yes

(4) . . . .

(5) [THIS ISSUE IS TO BE ANSWERED ONLY IF YOU HAVE ANSWERED THE FIRST ISSUE IN FAVOR OF THE PLAINTIFFS AND HAVE ALREADY AWARDED THE PLAINTIFFS SOME AMOUNT OF DAMAGES.] If so, were the representations of the defendants knowingly and wilfully made with knowledge of their falsity and with

the intention that the plaintiffs would rely upon them to their detriment?

ANSWER Yes

(6) . . . .

The force of these verdicts in revealing the unenviable - perhaps "indecent" - character of the defendant appellees is increased by the failure of the defendants to take the stand as witnesses or otherwise deny under oath the allegations of knowing and wilful misrepresentations. These accusations of fraud were pleaded with particularity by the plaintiffs in accordance with Federal Rule of Civil Procedure 9(b) and ample proof of their occurence was admitted into evidence during the trial.

As stated by the Supreme Court of North Carolina, "[p]roof of fraud would

necessarily constitute a violation of the provision against unfair and deceptive acts [N.C.G.S. §75-1.1 supra n.1]...." Hardy v. Toler, 288 N.C. 303, 309, 218 S.E.2d 342, 346 (1975). A jury though, does not directly determine whether a litigant has contravened the statues. Rather, the jury's function is "to find the facts, and based on the jury's findings the court must then determine as a matter of law whether the defendant's conduct violated G.S. 75-1.1." Love v. Pressley, 34 N.C. App. 503, 516, 239 S.E.2d 574, 583 (1978) cert.denied, 294, N.C. 441, 241 S.E.2d 843 (1978); Hardy, 288 N.C. at 310, 218 S.E.2d at 346-47. Consequently, the jury's finding that the defendants defrauded the plaintiffs ipso facto generates the conclusion that the prohibitions of the Act were transgressed.

Once the court ascertains that the Act has been violated, an award of treble

damages under N.C.G.S. 75-16 is not a matter for further jury consideration; it is a post-verdict assessment to be made by the court after the jury has fixed liability. Marshall v. Miller, 302 N.C. 539, 540-41, 276 S.E.2d 397, 399 (1981). Moreover, the trebling of any damages assessed is not a matter within the trail court's discretion, but "is automatic once a violation is shown." Id. at 547, 276 S.E.2d at 402. Thus, treble damages are not awarded by the verdict; they are an effect of the verdict. This liability of the defrauding defendants was fixed by a statute intended to express a public policy of North Carolina. Its origin, purpose and application of the law were laid out by the Supreme Court in Marshall. Id.

Mistakenly, the defendants assert

that the recovery of punitive damages by the plaintiffs precludes the allowance of treble damages.[2] The Supreme Court of

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[2]In North Carolina, the law employs punitive damages both to punish intentional wrongdoing and to deter others from similar behavioir. Newton v. Standard Fire Insurance Co., 291 N.C. 105, 113, 229 S.E.2d 297, 302 (1976). Punitive damages are awarded above and beyond actual damages and never are granted as compensation. Id. at 113, 220 S.E.2d at 302; Nunn v. Smith, 270 N.C. 374, 377, 154 S.E.2d 497, 498, 499 (1967); Overnite Transporation Co. v. International Brotherhood of Teamsters, 257 N.C. 18, 30 125 S.E.2d 277, 286 (1962).

To recover punitive damages, a plaintiff must prove that the defendant acted "wilfully or under circumstances of rudeness, oppression or in a manner which evidences a reckless and wanton disregard of the plaintiff's rights." Hardy v. Toler, 288 N.C. 303, 306-07, 218 S.E.2d 342, 345 (1975). Actionable fraud inherently involves intentional wrongdoing because "[f]raud is a malfeasance, a positive act resulting from a wilful intent to deceive . . . " Newton 291 N.C. at 113, 229 S.E.2d at 302; Davis v. Highway Commission, 271 N.C. 405, 408, 156 S.E.2d 685, 688 (1967). Newton represents a revision of the law concerning punitive damages, from those principles set forth in Hardy. Consequently, a plaintiff who demonstrates actionable fraud by the defendant need no longer also show

North Carolina, however, has never declared that the receipt of one bars the other. In Hardy, a case concerning misrepresentations made during the sale of an automobile, the plaintiff prayed for actual, punitive and treble damages. 288 N.C. at 304, 218 S.E.2d at 343. The Court held that the defendant's actions were fraudulent, but not sufficiently fraudulent to subject the defendants to punitive damages. [Incidentally, this deficiency is not the fact presently]. Id. at 307 218 S.E.2d at 345. Thus it demonstrated the distinction between the two classes of damages. The Court confirmed this view, also holding that the false representations constituted unfair and deceptive acts in violation of §75-1.1 and trebled the actual damages in

aggravating circumstances in order to receive punitive damages. Newton, 291 N.C. at 113-14, 229 S.E.2d at 302.

accordance with §75-16. Id. at 311,218 S.E.2d at 348. The Court predicated its conclusion on the ground that §75-16 "is itself punitive in nature."[3]

Again, it is worthy of note, that the State Supreme Court rejected the notion

[3]Id. In contrast to a plaintiff seeking punitive damages, a plaintiff suing for violations of the North Carolina Unfair Trade Practices Act, N.C.G.S. §§ 75-1.1,-16, is not required to establish intentional wrongdoing on the part of the defendant. Marshall v. Miller, 302 N.C. 539, 547, 276 S.E.2d 397, 402 (1981); see also United Roasters, Inc. v. Colgate Palmolive Co., 649 F.2d 985, 991 (4th Cir. 1981). Rather, the plaintiff need only demonstrate that the acts complained of possessed the tendency or capacity to mislead, or created the likelihood of deception. Marshall, 302 N.C. at 548, 276 S.E.2d at 403.

The Supreme Court of North Carolina further has held that the treble damages statute, N.C.G.S. §75-16, is both remedial and punitive in nature, a "hybrid statute" that sanctions an entirely statutory cause of action. Id.; Edmisten v. J.C. Penney, Inc. 292 N.C. 311, 319 233 S.E.2d 895, 900 (1977). Although proof of fraud "necessarily constitute[s] a violation of the provision against unfair and deceptive acts [75-1.1]," such proof is not integral to a recovery under §75-16. Hardy, 288 N.C. at 309, 218 S.E.2d at 346.

that the treble damages provision, §75-16, as exclusively penal in nature. State ex rel. Edmisten v. J.C. Penney Co., 292 N.C. 311, 319, 233 S.E.2d 895, 900 (1977). As a result, the Court of Appeals held that actual damages, even if trebled via §75-16, were not a penalty.[4] In sum, these decisions delineate a clear distinction in both purpose and scope between treble and

[4]Holley v. Coggin Pontiac, Inc., 43 N.C. App. 229, 237, 259 S.E.2d 1,6 (1979) petition for discretionary review denied 298 N.C. 806, 261 S.E.2d 919 (1979). In Holley, the North Carolina Court of Appeals confronted the issue again in considering the question of whether North Carolina's one year statute of limitations for actions subjecting a defendant to a penalty applied to suits under §75-1.1 The Court stated that §75-1.1 served three major purposes, only on of which was punitive:

> (1) to serve as an incentive for injured private individuals to ferret out fraudulent and deceptive trade practices, and by so doing, to assist the State in enforcing the act's prohibitions; (2) to provide a remedy for those injured by way of unfair and deceptive trade practices; and (3) to serve as a deterrent against future violations of the statute.

Id.

punitive damages.

II.

Notwithstanding their claims to the contrary, the defendants were fully aware of this potential liability. Repeated notice of their treble damage accountability was given before and after verdict. The statute itself carried word of this liability before trial. The law of North Carolina charged them with notice that conduct such as theirs was denounced by section 75-1.1. They were made civilly liable by the treble damage statute, section 75-16, as well as by the decision in Hardy, 288 N.C. at 309, 218 S.E.2d at 346. Indeed this was a claim within the prayer of the complaint "for such further relief as may be just and proper."

Obviously then, further pleadings by the plaintiffs were unneeded. Simply to

make their claims more formal, plaintiffs moved to amend the complaint to emphasize this claim. Although F.R.C.P. 15 liberally permitted the amendment and Rule 54(c) allowed this relief, even if the party had not demanded it in his pleadings, the District Judge overruled the motion. This was an abuse of discretion for the issue was not one of discretion in any event.

Nonetheless, the majority of this Court would uphold the desision of the District Judge arguing that the plaintifs unduly had failed to plead a cause of action under the Act and so, prejudiced the defendants. Aside from the demerits of the defendants' claims, it must also be recalled that where the jurisdiction of the Federal Court rests on diversity of citizenship, the doctrine of Erie R.R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 118 (1938), broadly dictates that

the court apply State substantive law when adjudicating rights created by that State. Hanna v. Plumer, 380 U.S. 460, 465, 85 S.Ct. 1136, 1140, 14 L.Ed.2d 8 (1964); Markham v. City of Newport News, 292 F.2d 711, 718 (4th Cir.1961). What constitutes a proper remedy for the harm suffered by a plaintiff is a question of substance governed by State law. McLeod v. Stevens, 617, F.2d 1038, 1041 (4th Cir.1980). As already noted, and as conceded by the majority, treble damages are a proper remedy for the plaintiffs in accordance with the court decisions and statutes of North Carolina.

The doctrine of Erie, however, does not generally extend to matters of Federal jurisdiction or procedure. Id. At all events, the availability of treble damages as a remedy is assumed by F.R.C.P. 54(c) and 15(b) even though plaintiffs' complaint did not expressly request such

an award. McLeod, 617 F.2d at 1040; see 6 C. Wright & A. Miller, Federal Practice and Procedure §1491 (1971).

Rule 54(c) allow a party to receive the relief to which he "is entitled, even if the party has not demanded such relief in his pleadings." This Court has liberally construed this provision "leaving no question that it is the court's duty to grant whatever relief is appropriate in the case on the basis of the facts proved." Robinson v. Lorillard Corp., 444 F.2d 791, 803 (4th Cir.1971). Additionally, Rule 15(b) permits amendment of the pleadings to conform to the evidence presented at trial when issues not covered by the pleadings are tried by the "express or implied consent of the parties." McLeod, 617 F.2d at 1041. These rules further a theory of liberalized pleading and procedure under which "a party's misconception of the

theory of his case does not work a forfeiture of his legal rights." New Amsterdam Casualty Co. v. Waller, 323 F.2d 20, 25 (4th Cir.1963).

Although substantial prejudice to an opposing part may defeat relief under 54(c), Robinson, 444 F.2d at 803, the present defendant's claim of prejudice is unpersuasive. An award of treble damages would stem directly from the facts proved at trial concerning the defendant's fraud. Id. at 803; United States v. Marin. 651 F.2d 24, 31 (1st Cir.1981). More importantly, the issue of fraud was raised by the initial pleadings, was presented to the jury, and was central to a recovery of actual or treble damages. Rental Development Corp. v. Lavery, 304 F.2d 839, 843 (4th Cir.1962).

In respect to any purported surprise, the defendants continually were on notice that the plaintiffs sought a substantial

recovery arising from the sale of sophisticated machinery. No fundamental unfairness would be worked upon the defendants by the trebling of damages particularly because these damages are sought simply as a supplement to general damages. See 5 C. Wright & A. Miller, Federal Practice & Procedure, §1311, (1971).

Therefore, I would reverse the judgment of the District Court and remand with instructions to treble the actual damages awarded by the jury.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-1199(L)

Atlantic Purchasers, Inc., et al, Appellants,

versus

Aircraft Sales, Inc., et al, Appellees.

No. 82-1200

Atlantic Purchasers, Inc., et al, Appellees,

versus

Aircraft Sales, Inc., et al, Appellants.

No. 82-1322

Atlantic Purchasers, Inc., et al, Appellees,

versus

Aircraft Sales, Inc., et al, Appellants.

O R D E R

IT IS ORDERED that the May 18, 1983 order pertaining to the suggestion for rehearing en banc is hereby amended to read as follows:

A suggestion for rehearing en banc was made by Judge Bryan. Upon a poll of the Court on the suggestion for rehearing en banc, all of the judges voted against rehearing en banc, except Judge Russell and Judge Bryan, who voted in favor of rehearing en banc.

IT IS ADJUDGED AND ORDERED that the suggestion for rehearing en banc has failed.

Entered at the direction of Judge Bryan.

For The Court,

/s/William K. Slate, II
CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-1199(L)

Atlantic Purchasers, Inc.,
Stella Maris Inn, Ltd.;

Appellants,

versus

Aircraft Sales, Inc.,
Donald J. Anklin;

Appellees.

No. 82-1200

Atlantic Purchasers, Inc.;
Stella Maris Inn, Ltd.;

Appellees,

versus

Aircraft Sales, Inc.;
Donald J. Anklin;

Appellants.

No. 82-1322

Atlantic Purchasers, Inc.;
Stella Maris Inn, Ltd.,

Appellees,

versus

Aircraft Sales, Inc.;

Donald J. Anklin;

Appellants.

O R D E R

A suggestion for rehearing en banc was made by Judge Bryan. A poll of the Court was requested, and in a poll a majority of the judges eligible to vote, voted to deny rehearing en banc, therefore,

IT IS ORDERED that the suggestion for rehearing en banc has FAILED.

Entered at the direction of Judge Bryan.

For The Court

/s/William K. Slate, II

CLERK